UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

WESTERN REFINING WHOLESALE, INC.
an affiliate of WESTERN REFINING, INC.

and Cases 28–CA–067703
28–CA–073601

GIANT INDUSTRIES, INC., a wholly owned
subsidiary of WESTERN REFINING, INC.

and Case 28–CA–071261

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION 492, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

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John Giannopoulos, Esq., and *Sophia Alonso, Esq.,*
for the Acting General Counsel.

Charles C. High Jr., Esq., for the Respondent.

Moises L. Ortega, President/Organizer
of Albuquerque, New Mexico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Albuquerque, New Mexico, over a period of 19 days between April 24 and August 15, 2012, upon the order further consolidating cases, second consolidated complaint, and notice of hearing, as amended[1] (the complaint), issued on March 27, 2012, by the Regional Director for Region 28.

[1] At the trial on April 24, 2012, counsel for the Acting General Counsel moved to amend the complaint to allege additional pars. 5(hh), (jj), and (kk), pars.s 7(h)–(j), and par. 8. The motion was granted. See GC Exhs. 1(hh) and 5. On the last day of the trial, August 15, 2012, after 19 days of hearing, counsel for the Acting General Counsel moved to amend the complaint to allege for the first time that Western Refining Southwest, Inc., was a Respondent and that Western Refining, Inc., was the controlling shareholder of Western Refining Southwest, Inc. See GC Exh. 169. The motion was denied as untimely.

The complaint alleges in 116 separate counts that Western Refining Wholesale, Inc. (Respondent Wholesale) and Giant Industries, Inc. (Respondent Giant), a wholly owned subsidiary of Western Refining, Inc. (collectively called Respondents), violated the Act by engaging in the following unfair labor practices:

The complaint alleges in paragraphs 5(a)-(kk) that Respondent Wholesale violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing overly-broad no-solicitation/no-distribution and confidentiality rules in its employee handbook; by orally promulgating an overly-broad rule prohibiting employees from discussing union activity; by orally promulgating and disparately enforcing a rule prohibiting employees from harassing other employees; by promulgating and enforcing an overly-broad and discriminatory rule prohibiting off-duty employees from being in the employee breakroom; by promulgating and enforcing an overly-broad and discriminatory rule restricting employees from posting literature on Respondent's walls in nonwork areas; by interrogating employees about their union activities; by creating an impression that employees' union or protected/concerted activities were under surveillance; by engaging in surveillance of employees' union activities; by promising employees increased benefits in order to encourage employees not to support the Union; by granting employees increased benefits in order to encourage employees not to support the Union; by soliciting employees grievances; by threatening employees with unspecified reprisals for engaging in union activity; by threatening employees with lower hourly wages if they voted for the Union; by threatening employees with plant closure and discharge if they selected the Union as their bargaining representative; by threatening employees with loss of benefits and lengthy litigation if they selected the Union as their bargaining representative; by threatening employees with discharge if they selected the Union as their bargaining representative; by threatening employees with charges of insubordination because of their union activity; by threatening employees to quit because of their union activity; by threatening employees with unspecified reprisals by telling employees it was unlawful to discuss the Union on Respondent's premises; by threatening its employees with loss of bonuses for violating an overly-broad no-solicitation/no-distribution rule; by telling employees it was futile to vote for the Union; by soliciting employees signatures on an antiunion petition; and by telling employees that bargaining would start from scratch if they selected the Union as their bargaining representative.

In paragraphs 6(a)–(j), the complaint alleges that Respondent Giant violated Section 8(a)(1) of the Act by discriminatorily denying off-duty employees and union organizers access to parking lots and other nonwork areas because they engaged in union activity; and by threatening to call police because employees and union organizers engaged in union activity.

In paragraphs 7(a)–(j), the complaint alleges that Respondent Wholesale violated Section 8(a)(1) and (3) of the Act by accelerating the termination of employee Leroy Regensburg; by selectively increasing pay and benefits of employees; by issuing oral warnings to employees Kevin Taddy, Obie Frazier, and Roberto Aguirre; by issuing a written warning and suspension to employee Taddy; by suspending employee Reginald Lemoine; by suspending its employee Jaime Holguin; and by issuing a written warnings to Frazier.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from counsel for the Acting General Counsel, General Counsel, and Respondent, I make the following findings of fact.

I. Jurisdiction

Respondent Wholesale admitted it is an Arizona corporation, with offices and places of business located in the State of New Mexico and El Paso, Texas, where it is engaged in the wholesale distribution and interstate transportation of petroleum products. Annually, Respondent Western Refining in the course of its business operations derived gross revenues in excess of $500,000, and purchased and received in its New Mexico facilities goods valued in excess of $50,000 directly from points located outside the State of New Mexico. Respondent Wholesale admits in its answer and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent denies the allegations of complaint paragraphs 2(d)–(f) that Giant Industries is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In paragraph 2(g), the complaint alleges that Respondents Western Refining Wholesale, Inc. and Giant Industries, Inc. have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; they have shared common premises and facilities, including their corporate offices in Tempe, Arizona; they have provided services and sales to each other; and have held themselves out to the public as a single-integrated business enterprise called Western Refining, Inc. In its answer, Respondent denies the allegations of complaint paragraph 2(g).

The threshold issue is whether named Respondent's, Western Refining, Inc. Giant Industries, Inc. and Western Refining Wholesale, Inc., or any other entities affiliated with Western Refining, Inc. constitute a single-integrated business enterprise.

A. Western Refining, Inc.'s Business Operations

In its 10(k) annual report[2] to the United States Securities and Exchange Commission (SEC) filed on February 29, 2012, Respondent Western Refining, Inc. explains in its own words that it is a conglomeration of wholly owned corporations that engage in business as a crude oil refiner and marketer of refined products:

> We are an independent crude oil refiner and marketer of refined products and also operate service stations and convenience stores. We own and operate two refineries with a total crude oil throughput capacity of approximately 151,000 barrels per day, or bpd. . . .
>
> Our primary operating areas encompass West Texas, Arizona, New Mexico, Utah, Colorado, and the Mid-Atlantic region. In addition to the refineries, we also own and operate standalone refined product distribution terminals in Albuquerque, New Mexico; and Bloomfield;

[2] GC Exh. 9, pp. 3–10.

> At February 24, 2012, we also operated 210 retail service stations and convenience stores in Arizona, Colorado, New Mexico, and Texas; a fleet of crude oil and refined product truck transports; and a wholesale petroleum products distributor that operates in Arizona, California, Colorado, Nevada, New Mexico, Texas, Maryland, and Virginia. . . .
>
> On May 31, 2007, we completed the acquisition of Giant. Prior to the acquisition of Giant, we generated substantially all of our revenues from our refining operations in El Paso. With the acquisition of Giant, we also gained a diverse mix of complementary retail and wholesale businesses.
>
> Following the acquisition of Giant, we began reporting our operating results in three business segments: the refining group, the wholesale group, and the retail group. Our refining group operates the two refineries and related refined product distribution terminals and asphalt terminals. At the refineries, we refine crude oil and other feedstocks into refined products such as gasoline, diesel fuel, jet fuel, and asphalt. Our refineries market refined products to a diverse customer base including wholesale distributors and retail chains. Our wholesale group distributes gasoline, diesel fuel, and lubricant products. Our retail group operates service stations and convenience stores and sells gasoline, diesel fuel, and merchandise. . . .
>
> Our refineries make various grades of gasoline, diesel fuel, jet fuel, and other products from crude oil, other feedstocks, and blending components. We also acquire refined products through exchange agreements and from various third-party suppliers. We sell these products through our own wholesale group and service stations, independent wholesalers and retailers, commercial accounts, and sales and exchanges with major oil companies. . . .
>
> At February 24, 2012, our retail group had 210 convenience stores operating under various brands, including Giant, Western, Western Express, Howdy's, Mustang, and Sundial. Gasoline brands sold through these stores include Western, Giant, Mustang, Phillips 66, Conoco, Shell, Chevron, and Texaco.

B. The Western Refining Family of Corporations

As part of its SEC filing,[3] Respondent Western Refining, Inc. listed its corporate holdings. These corporations listed include:

> Western Refining Company, L.P.; Western Refining GP, LLC; Western Refining LP, LLC*; Giant Industries, Inc.*; *Western Refining Southwest, Inc.* (fka Giant Industries Arizona, Inc.); *Western Refining Wholesale, Inc.* (fka Phoenix Fuel Co., Inc.); Western Refining Yorktown, Inc. (fka Giant Yorktown, Inc.); Western Refining Pipeline Company (fka Giant Pipeline Company); Western Refining Terminals, Inc. (fka Giant Mid-Continent, Inc.); Western Refining ALH, LLC; Dial Oil Co. dba Western Refining Wholesale—New Mexico; Giant Stop-N-Go of New Mexico, Inc.; Giant Four Corners,

[3] See GC. 9, p. 115, Exh. 21.1, incorporating by reference the list of subsidiaries set forth in Exh. 21.1 of the 10(k) report filed with the SEC on February 29, 2008.

> Inc.; Navajo Convenient Stores Co., LLC, and Giant Four Corners, Inc., among others. [Emphasis added.].

Despite Respondent's argument to the contrary, the record reflects that there is common ownership among the key corporations in this case. Thus, Giant Industries, Inc., which is owned by Western Refining, Inc., owns Western Refining Southwest, Inc., which in turn owns Western Refining Wholesale, Inc.[4] Western Refining Southwest, Inc. owns the Gallup and Bloomfield refineries, the entire retail organization, including the gas stations and convenience stores, the wholesale operations, and has the responsibility for selling the products manufactured by the El Paso refinery. (Tr. 2948-2951, 3011-3012; GC Exh. 79.)

Counsel for the General Counsel points to a number of factors it contends establish that Western Refining, Inc. is a single-business enterprise composed of several corporate entities, including Western Refining Wholesale, Inc., Western Refining Southwest, Inc., and Giant Industries, Inc. Those factors include common officers and managers, common labor relations policy, common employee benefits, cooperation in hiring, and common processes.

C. The Western Refining Family of Officers and Managers

Contrary to Respondent's assertion, the evidence establishes that there is commonality in officers and managers throughout Respondent Western's Refining, Inc.'s various corporate entities. Jeff Stevens is a director, president, and chief executive officer of Western Refining, Inc. He holds those same titles for Giant Industries, Inc., Western Refining Southwest, Inc., and Western Refining Wholesale, Inc.[5]

Mark Smith holds the titles of president of refining and marketing for Giant Industries, Inc, Western Refining Southwest, Inc., and Western Refining Wholesale, Inc.[6] Smith is responsible for Respondent's refining, wholesale, and retail operations. He reports directly to Jeff Stevens.

Victor Rueda is the vice president for human resources for Western Refining Southwest, Inc. and Western Refining Wholesale, Inc.[7] He is the highest ranking human resources official for Western Refining, Inc. and its various subsidiaries. Rueda reports directly to Mark Smith.

Matthew Yoder is the vice president of retail for both Western Refining Southwest, Inc. and Western Refining Wholesale, Inc.[8] Yoder directs Respondent's retail operations. He reports directly to Mark Smith.

Robert ("Rocky)" Sprouse is the vice president of retail for Western Refining Southwest, Inc.[9] He reports directly to Yoder. Sprouse directly manages operations managers, including

[4] GC Exhs. 164–166.
[5] GC Exhs. 9 (pp. 22, 117), 79–80, and 164–166.
[6] Ibid.
[7] GC Exhs. 164–165.
[8] Ibid.
[9] GC Exh. 164.

New Mexico Operations Manager Randy Bondaranto. The retail district managers, including Susan Montoya, report directly to Bondaranto.

Scott Stevens is the vice president of wholesale/marketing for Western Refining Southwest, Inc. and Western Refining Wholesale, Inc.,[10] and operates the operations side of the business. He reports directly to Mark Smith.

Kevin Goode, the vice president of Western Refining Wholesale, Inc.,[11] reports directly to Scott Stevens. Chris Proctor is Western Refining Wholesale, Inc.'s general manager of distribution/transportation, and he reports directly to Goode. Overseeing Western Refining Wholesale, Inc.'s safety operations is Safety Manager Tony Smith, who reports directly to Chris Proctor. Proctor also supervises Steve Curtwright, Western Refining Wholesale, Inc.'s distribution and operations manager. Curtwright monitors the day-to-day operations of the various terminals, and supervises the 9 or 10 different terminal managers who report directly to him, including Mike Gailey, the El Paso terminal manager, Lynn Milton the Bloomfield terminal manager, David Townsend and Darryl Hampton, the Gallup terminal managers, and the Albuquerque Terminal Managers Eric Burnham and Jonas Armenta.

D. Respondent's Human Resources Department

While Respondent maintains that the disparate corporations have independent labor relations policies, the record belies this assertion. Vice president for human resources for both Western Refining Southwest, Inc. and Western Refining Wholesale, Inc., Victor Rueda, is Respondent's senior human resources manager for all of its subsidiary companies. Respondent's director of human resources, Dion Geary, reports directly to Rueda. Rueda admitted that the human resources functions for all of Respondent's subsidiaries report to him, including health and welfare programs, recruiting of employees, payroll, and labor relations. Rueda is also responsible for developing new human resources policies. The human resource managers at Respondent's various subsidiaries have a reporting relationship to both Geary and Rueda. While Pamela Scott, the human resources manager for Respondent Western Refining Wholesale, Inc. reports to Kevin Goode, she also reports to Rueda. Ron Rassmussen, human resources manager for Western Refining Southwest, Inc., also reports to Rueda. Rueda admitted that he has the right to discuss changes in the performance evaluations of human resource managers at both Western Refining Southwest, Inc. and Western Refining Wholesale, Inc., and is involved in the hiring process of new human resource managers at the Western subsidiaries.

Delbert Tig is Respondent's benefits manager, and he reports directly to Dion Geary. Tig together with the trustee committee, decides which benefits will apply to each individual group of Respondent's employees at all subsidiaries.

A number of human resources generalists report directly to Pamela Scott, including Catheryne Valdez, the HR generalist at the Bloomfiled terminal. Valdez started working for Respondent in January 2012. Colleen Redfearn previously held this position until December 2011, but no longer works for Respondent. The Bloomfield human resources generalists also cover the Gallup and Albuquerque terminals.

[10]GC Exhs. 164–165.
[11] GC Exh. 165.

Rueda or Geary conduct regular meetings for human resources employees of both Western Refining Wholesale, Inc. and Western Refining Southwest, Inc.—the wholesale and retail arms of Western Refining, Inc. These meetings are attended by all of the human resources managers, generalists, payroll employees, and support staff. At these meetings the development of new policies are discussed.

As noted above, Rueda takes the lead in developing new human resources policies, at both Western Refining Wholesale, Inc. and Western Refining Southwest, Inc. Contrary to Sprouse's contention that no employment practices are accepted without his approval at Western Refining Southwest, Inc., Rueda stated that he assists Western Refining, Inc's subdivisions on implementing new policies and he mandates policies required by law across all corporate entities. Rueda tries to keep all human resources policies uniform across all divisions, but due to differences among the various corporations, there may be some variance in policies where there is a collective-bargaining agreement in place or where the nature of employees' work at Western Refining Southwest, Inc., the retail division, causes differences in pay and when they qualify for benefits.

The labor relations policies are common throughout Respondent's various subsidiaries. Respondent's policies are enforced through a common employee handbook for employees across all subsidiaries entitled, "Western Refining Employee Handbook."[12] It was published by Respondent Western Refining, Inc. and is distributed it on Respondent's internet portal Westlink. While Sprouse contended that he had his own handbook for Western Refining Southwest, Inc. employees, all the handbooks were created in Rueda's department, together with various human resources managers from Wholesale and Southwest.

Respondent has common health and welfare plans,[13] a 401(k) plan, and a disability plan available to all employees, across all corporate divisions. The employees of all Western Refining, Inc. corporations use the same forms and open enrollment period to make application for these benefits. Respondent's health and welfare plans are administered through a trust. The trust has a committee which administers the plans and makes decisions on claims, coverage issues, and claims not paid. The trustees are employees of Western Refining subsidiaries and include Rueda, Scott, Rasmussen, Yoder, Geary, and John Howell. The trustees who administer the plan have the final say on any claims disputes.[14] The trustees decide what will be included in the benefit packages for Respondent's employees, including those at Western Refining Southwest, Inc. and Western Refining Wholesale, Inc.

The lines between the various corporate entities have become so blurred that Scott was unable to define which entities her superiors worked for. It is interesting to note that when Scott was questioned as to which corporate entity Rueda worked for in producing the employee handbooks, Wholesale, Southwest, or Western Refining, Inc., she did not know. Even Goode, who is a vice president for Western Refining Wholesale, Inc., testified nobody is above him.

[12] GC Exh. 6.
[13] GC Exh. 92.
[14] Tr. at 3054, LL. 9–11.

However, the documents filed with the State of Arizona shows that Mark Smith is the president, and Jeff Stevens is the president/CEO of Wholesale.[15]

E. The Analysis

1. The due-process issue concerning Western Refining Southwest, Inc.

Respondent contends that since Western Refining Southwest, Inc. was not named in the complaint herein, as a Respondent or, part of the single- integrated business enterprise allegation, it would violate due process at this juncture to find them liable for any unfair labor practices.

Counsel for the General Counsel cites *Mammouth Coal Co.*, 358 NLRB No. 159, slip op. at 8 (2012), to establish that Western Refining, Inc., Giant Industries, Inc., Western Refining Southwest, Inc., and Western Refining Wholesale, Inc. constitute a single-integrated business enterprise and that due process is not denied simply because Western Refining Southwest, Inc. is not named in the complaint.

In *Mammouth Coal,* supra, 358 NLRB No. 159, slip op. at 8, the Board held that:

> Although the complaint does not specifically allege that Mammoth and Massey were a single employer, the General Counsel did allege a theory of Massey's broad, encompassing liability for Mammoth's conduct, which he described as the parties acting as agents of each other regarding all relevant conduct.

The Board noted that considerable evidence was introduced at the hearing:

> [C]oncerning the relationships between and among Massey, Mammoth, and other Massey subsidiaries. Moreover, the General Counsel argued a single-employer theory in his posthearing brief to the judge. [Id., slip op. at 8.]

During the hearing in *Mammouth Coal,* supra, much evidence was adduced that Mammoth and Massey were a single employer, including evidence of Massey's ownership of its subsidiaries, including Mammoth, common management, interrelated operations of Massey and its subsidiaries, and Massey's control over its subsidiaries labor relations.

On appeal, like here, Respondent's argued that the record was incomplete because Massey did not know it would have to defend against the single-employer issue. The Board rejected this contention, citing among other factors that it invited Respondents on appeal to proffer any evidence it would have raised at trial on the single-employer issue, the broad theory of liability alleged from the outset in the complaint, the extensive relevant evidence admitted at the hearing, the lack of any additional evidence identified as relevant or necessary, and the opportunities provided to the Respondents to brief the single-employer issue.

Unlike *Mammouth Coal*, here, General Counsel pled a single-integrated business theory alleging that Western Refining, Inc., Giant Industries, Inc., and Western Refining Wholesale,

[15] GC Exh. 165.

Inc. have been affiliated business enterprises with common officers, ownership, directors, management, and supervision and have held themselves out to the public as a single-integrated business enterprise called Western Refining, Inc. A plethora of evidence adduced at hearing, without objection, established that in fact Western Refining, Inc. owns Giant Industries, Inc. which in turn owns Western Refining Southwest, Inc. which owns Western Refining Wholesale, Inc. Further evidence was introduced, without objection, showing common management and officers from Western Refining, Inc. on down to Western Refining Wholesale, Inc. The record is replete with evidence of common labor relations policy among Western Refining subsidiaries. Given that Respondent knew of the General Counsel's theory of single-integrated enterprise from the complaint, the voluminous evidence offered by the General Counsel on the single-integrated employer issue throughout the hearing with respect to Western Refining Southwest, Inc., i.e., Respondent's "retail division," Respondent was put on notice of whether Western Refining Southwest, Inc. was one of Respondent's entities constituting a single-integrated business enterprise and the matter was fully litigated during the hearing. *Mammouth Coal Co.*, 358 NLRB No. 159, slip op. at 8; *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); and *Meisner Electric, Inc.*, 316 NLRB 597, 597 (1995), affd. mem. 83 F.3d 436 (11th Cir. 1996). See also *Airborne Freight Corp.*, 343 NLRB 580, 581(2004); and *Hi-Tech Cable Corp.*, 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997).

2. The single-employer issue

I turn now to the merits of the single- integrated enterprise issue. In *Mammouth Coal Co.*, supra, the Board reaffirmed the factors it has traditionally considered in determining whether a group of entities constitute a single-integrated enterprise. These factors are common ownership, interrelated operations, common management, and centralized control of labor relations. Id., supra, slip op. at 11–12. Of these four factors, centralized control of labor relations is generally considered the most significant.

There has been much reference in the evidence and in argument in briefs to Western Refining. While there is no legal entity called "Western Refining," Western Refining, Inc. holds itself out as something called "Western Refining." Thus, in its employee handbook, applicable to all employees at each subsidiary, it is stated, "The use of 'Company' or 'Western Refining' throughout this handbook refers to the specific Western Refining subsidiary by which you are employed."[16] Rather, there exists a tangled web of corporations from Western Refining, Inc. to Giant Industries, Inc., to Western Refining Southwest, Inc., to Western Refining Wholesale, Inc., that in various ways including handbooks, forms, intranet sites, and SEC filings refer to something called Western Refining. The evidence adduced over 5 weeks of hearing clearly show that the Respondents herein, Western Refining, Inc., Giant Industries, Inc., Western Refining Southwest, Inc., and Western Refining Wholesale, Inc. are a single employer.

With respect to common ownership, the record establishes this element without a shadow of a doubt. Western Refining, Inc. owns Giant Industries, Inc. which owns Western Refining Southwest, Inc. which in turn owns Western Refining Wholesale, Inc.

[16] GC Exh. 6, p. 9.

There can also be no doubt that "Western Refining" is a vertically integrated, interrelated business operation doing business as a crude oil refiner and marketer of refined products. As their own annual report to the SEC describes, Western Refining, Inc. owns the refineries that produce finished petroleum products, it owns Western Refining Wholesale, Inc. which distributes, via its fleet of trucks, those refined products to its customers, and its owns Western Refining Southwest, Inc. which sells refined products to the public through its variously branded gas stations.

Common management at various Western Refining, Inc. subsidiaries reinforces the notion that there is integration of the various components of the Western Refining oil empire. Jeff Stevens is a director, president, and chief executive officer of Western Refining, Inc. He holds those same titles for Giant Industries, Inc., Western Refining Southwest, Inc., and Western Refining Wholesale, Inc. Mark Smith holds the titles of president of refining and marketing for Giant Industries, Inc, Western Refining Southwest, Inc., and Western Refining Wholesale, Inc. Smith directs Respondent's refining, wholesale/marketing, and retail operations. He reports directly to Jeff Stevens. Victor Rueda is the vice president for human resources for Western Refining Southwest, Inc. and Western Refining Wholesale, Inc. He is the highest ranking human resources official for Western Refining, Inc. and its various subsidiaries. Rueda reports directly to Mark Smith. Matthew Yoder is the vice president of retail for both Western Refining Southwest, Inc. and Western Refining Wholesale, Inc. Yoder directs Respondent's retail operations. He reports directly to Mark Smith. Robert ("Rocky)" Sprouse is the vice president of retail for Western Refining Southwest, Inc. He reports directly to Yoder. Scott Stevens is the vice president of wholesale/marketing for Western Refining Southwest, Inc. and Western Refining Wholesale, Inc., and operates the operations side of the business. He reports directly to Mark Smith. Kevin Goode, the vice president of Western Refining Wholesale, Inc., reports directly to Scott Stevens.

Finally, further reflecting the close relationship of Respondent Western Refining, Inc.'s corporate subsidiaries, there is centralized control of labor relations among all of its subsidiaries. Rueda is the highest ranking human resources official for Western Refining, Inc. and its various subsidiaries. Rueda reports directly to Mark Smith who runs Giant Industries, Inc., Western Refining Southwest, Inc., and Western Refining Wholesale, Inc. Rueda develops new human resources policies companywide. This centralized control of labor policy is reflected in common health and welfare plans, a 401(k) plan, and a disability plan available to all employees at all corporate subdivisions. In order to ensure uniform enforcement of Respondent Western Refining, Inc. labor relations policies, the human resource managers at Respondent's various subsidiaries have a reporting relationship to Rueda. Rueda can enforce Western Refining, Inc.'s labor relations policies at each subsidiary since he has the authority to modify the evaluations of each subsidiary's human resources manager. Respondent Western Refining, Inc. further ensures common labor practices through an employee handbook applicable by its terms to all employees through all subsidiaries.[17] This handbook was developed by Rueda.

I conclude that based upon the presence of common ownership, interrelated operations, common management, and centralized control of labor relations among all of Western Refining, Inc.'s subsidiary corporations that Western Refining, Inc., Giant Industries, Inc., Western Refining Southwest, Inc., and Western Refining Wholesale, Inc. constitute a single- integrated

[17] Ibid.

business enterprise called Western Refining, Inc. *Mammouth Coal Co.*, 358 NLRB No. 159 (2012).

II. Labor Organization

Respondent admitted and I find that Chauffeurs, Teamsters and Helpers Local Union 492, International Brotherhood of Teamsters (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background Information

This case arises in the context of a union organizing drive by the Union herein. The instant case is not Respondent Western Refining Wholesale, Inc.'s first experience with an organizing effort by the Union. The Union's first attempt at organizing Respondent Wholesale's drivers occurred in 2008 and resulted in the filing of a representation petition in Case 28–RC–006587. An election was conducted among Respondent Western Refining Wholesale drivers in New Mexico, Colorado, Arizona, and Texas, and resulted in the Union losing the election.[18]

In early 2011, the Western Refining Wholesale drivers at its terminals located in Albuquerque, Bloomfield, and Gallup, New Mexico, and in El Paso, Texas, began to complain about the treatment of one of their coworkers, Rafael Cisneros, who had been suspended without pay for receiving a traffic citation. The drivers not only discussed this matter among themselves, they also complained directly to their managers. In addition, in about April 2011 a number of the drivers began to contact the Union and began a second organizing drive, seeking support among their coworkers.

The record is clear that Respondent Western Refining Wholesale, Inc., General Manager of Distribution/Transportation Chris Proctor became aware of his employees' organizing efforts on about June 29, 2011. On June 30, 2011, he in turn informed his boss, Respondent Western Refining Wholesale, Inc., Vice President Kevin Goode, of the driver's organizing efforts.[19] Goode immediately told Proctor to find out what was going on. Later, Proctor responded that drivers were trying to join a union.

Respondent Western Refining, Inc. maintains an employee handbook[20] applicable to all its subsidiaries which was effective April 26, 2011. The handbook contains several provisions that are in dispute in this proceeding.

1. Conflicts of interest rule

Complaint paragraph 5(b) alleges that the following rule is overly broad and discriminatory:

[18] GC Exh. 161.
[19] GC Exh. 40.
[20] GC Exh. 6 is the handbook effective April 26, 2011.

> Conflicts of Interest[21]
>
> *General*. All directors, officers and employees of the Company have a primary business responsibility to the Company and must avoid any activity that may interfere, or have the appearance of interfering with the performance of this responsibility**.**
>
> While the following will provide certain examples, if a question arises, a director, officer or employee should consult with the compliance officer.
>
> *Soliciting contributions or the sale of goods and services by or for other businesses or organizations on Company property* is prohibited unless prior consent is received from an officer of the Company. (GC 6, p. 48-49) (emphasis added).

The General Counsel contends that this rule chills employee Section 7 rights because it is a general ban on solicitation on company property.

This allegation is based upon language from that portion of Respondent's handbook entitled "Code of Business Conduct and Ethics." Respondent contends that this section of the handbook deals with *business* practices and procedures rather than employee solicitation and distribution in the sense normally associated with union solicitation and distribution.

This section commences with the statement that:

> This Code of Business Conduct and Ethics covers a wide range of business practices and procedures. It does not cover every issue that may arise but it sets out basic principles to guide all of our personnel.

One of the objectives of this code of conduct is to promote, "Honest and ethical conduct including handling of actual or apparent conflicts of interest between personal and professional relationships."[22] A conflict of interest is defined by the code as existing, "when a real or perceived private interest of a director, officer or employee is in conflict with the interest of the Company" or if "the individual has other duties, loyalties, responsibilities or obligations that are, or may be viewed as being inconsistent with the Company."[23]

This provision is broad and vague enough that a reasonable person could believe such provisions apply to employee solicitation in the sense normally associated with union solicitation and distribution. The section, by definition, applies to all employees. If it were meant to apply only to managers, directors, and officers of Respondent, it could have been so limited. To the contrary, conflicts of interest are so broadly defined that a reasonable employee could conclude that activities on behalf of the Union could be a, "private interest in conflict with Respondent's interests or as a loyalty "inconsistent with the Company." I conclude that this provision could be applied to employees' Section 7 activities.

[21] GC Exh. 6, pp. 48–49.
[22] Id. at p. 47.
[23] Id. at p. 48.

The test for the lawfulness of work rules has been established by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). In *Lutheran Heritage Village-Livonia,* the Board held that a rule not explicitly restricting Section 7 activity is found to be unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; and (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id.

Here, the language, "Soliciting contributions or the sale of goods and services by or for other businesses or organizations on Company property is prohibited unless prior consent is received from an officer of the Company," must be reviewed under the first prong of the *Lutheran Heritage Village-Livonia* test. Clearly, the language limits soliciting contributions and sales of services. The language does not appear to limit such Section 7 activities sales as soliciting signatures on union authorization cards, passing out union literature, or handbilling. Arguably, it could be applied to fundraising activities on the part of employees in support of the Union, such as candy or bake sales to support organizing activities. A similar rule in *MasTec Advanced Technologies,* 357 NLRB No. 17, slip op. at 13–14 (2011), that prohibited the solicitation of contributions on company property without the permission of the supervisor or division manager was found unlawfully broad. *Ambassador Services, Inc.,* 358 NLRB No. 130, slip op. at 7 (2012); *Mercedes-Benz of Orlando,* 358 NLRB No. 163, slip op. at 7–8 (2012). Therefore, Respondent's solicitation rule violates Section 8(a)(1).

2. Confidential information rule

Complaint paragraph 5(c) alleges that the following rule is overly broad and discriminatory:

> Confidential Information[24]
>
> Directors, officers and employees will obtain confidential information about the Company, its customers, operations, business prospects and opportunities in the course of their employment or tenure with the Company. Confidential information includes the following, although this list is not exclusive:
>
> . . . .
>
> * employee lists and employment data:
>
> . . . .
>
> [O]ther information relating to the Company and its employees, products, services and operations.
>
> Directors, officers and employees are given this information because it is necessary or useful in carrying out their duties for the benefit of the Company. No director, officer or

[24] Id. at pp. 51–52.

> employee may use it to further his or her personal interests, to make a profit or for any other purpose.

This rule is also found in Respondent's handbook under the heading "Code of Business Conduct and Ethics." Respondent also contends that this provision does not relate to employee activities while at work. For the reasons stated above, I conclude that a reasonable person could conclude that this rule applies to employee Section 7 activities at work.

The Board has long held that an employer may not restrict employees in sharing information such as employee names and addresses as such discussions among employees are usually a precursor to protected organizational activity. Handbook rules listing such information as confidential violate Section 8(a)(1) of the Act. *MasTec Advance Technologies,* 357 NLRB No. 17, slip op. at 13–14 (2011)

With respect to the Respondent's restriction on disclosing "employment data," the Board uses the term "employment data" when discussing employee wages, hours, and working conditions. *Sandpiper Convalescent Center,* 279 NLRB 1129, 1135 (1986). Accordingly, employees would reasonably construe Respondent's prohibition from disclosing "employment data" to further "his or her personal interests . . . or for any other purpose," as prohibiting them from discussing their terms and conditions of employment with a third party, including a labor union. As such, Respondent's handbook rule is overly broad and a violation of Section 8(a)(1) of the Act.

Respondent's confidentiality rule also defines as confidential "other information relating to the Company and its employees, products, services, and operations." In *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291–292 (1999), the Board in affirming the judge, held that a rule prohibiting employees from discussing their wages violates Section 8(a)(1) of the Act. In *Pontiac Osteopathic Hospital,* 284 NLRB 442, 466 (1987), the hospital expressly forbade its employees from discussing "hospital affairs . . . and employee problems." The Board held that such a rule could be construed by employees to preclude discussing terms and conditions of employment, including wages, which could fall under the broad categories of hospital affairs and employee problems. The Board further found that the respondent-hospital had not established a substantial and legitimate business justification for its policy. Accordingly, the Board found that the rule prohibiting discussing hospital affairs and employee problems violated Section 8(a)(1) of the Act.

In *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995), the employer's manual contained a provision which read, "No office business is a matter for discussion with spouses, families or friends." The Board held "office business" could reasonably be interpreted to include employees' terms and conditions of employment. As a result, the Board found that the manual provision was ambiguous. The Board then held that where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator. Thus, the Board found that the rule violated Section 8(a)(1) of the Act.

Here, applying the Board's test in *Flamingo Hilton-Laughlin,* supra, this provision is vague, ambiguous, and could be interpreted as limiting employee discussions of wages and other terms and conditions of employment, in violation of Section 8(a)(1).

Complaint paragraph 5(d) alleges the following rule to be overly broad and discriminatory:

> a. Solicitation and distribution rule
>
> SOLICITATION AND DISTRIBUTION[25]
> GENERAL POLICY:
> In order to minimize disruption of normal operations, Western Refining Company maintains a policy to limit and control solicitation and distribution on its Premises.
>
> GUIDELINES:
> . . . .
>
> 2) Employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time. Employees who are not on working time (e.g., those on breaks or lunch time) may not solicit employees who are on working time for any cause or distribute literature of any kind to them. *Employees may not distribute literature or printed materials of any kind in working areas at any time.*
> 3) *Any employee who is off-duty should not return to the Company premises until the next scheduled work time, unless he has prior approval from his supervisor.*
> [Emphasis added.]

The rule the General Counsel cited in complaint paragraph 5(d) is from Respondent's prior handbook and was replaced in its the new handbook, effective April 26, 2011. The new rule states:

> **SOLICITATION AND DISTRIBUTION**[26]
>
> **PURPOSE:**
>
> In order to minimize disruption of normal Company operations, the Company limits and controls solicitation and distribution on its premises.
>
> **POLICY:**
>
> 1) Persons who are not employed by the Company are prohibited from solicitation, including solicitation of financial contributions and signature, and distribution on Company premises without prior management approval.
>
> 2) Employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time. Employees who are not on working time (e.g., those on breaks or lunch time) may not solicit employees who are on working time for any cause or distribute literature of any kind to them.

[25] GC Exh. 7, p. 4.
[26] GC Exh. 6, p. 45.

I will first consider the old handbook rule cited in paragraph 5(d) of the complaint. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945), the Supreme Court held that the promulgation and enforcement of a rule prohibiting solicitation by employees for a union on the employer's property outside working time, is invalid absent the showing of special circumstance making the rule necessary for maintaining production or discipline. Following *Republic Aviation,* the Board has found rules prohibiting distribution of materials in working areas during nonworking time invalid. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962), *Ford Motor Co.,* 315 NLRB 609, 610 (1994).

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the Board found that a rule prohibiting distribution at any time in customer and public areas was unlawfully overbroad. Similarly, an employer may prohibit the distribution of union literature during working time in a work area, but may not prohibit distribution in a nonwork or mixed-use area, i.e., an area where some people perform work, but the majority use is for nonwork purposes. *United Parcel Service,* 327 NLRB 317 (1998), enfd. 228 F.3d 772, 776 (6th Cir. 2000).

Here, Respondent's rule deals with both solicitation and distribution. As to solicitation, the rule appears valid on its face since solicitation is limited only to working time. However, with respect to distribution, the rule states that employees may not "distribute literature or printed material of any kind in working areas at any time." Under *Stoddard-Quirk Mfg. Co.*, supra, this rule is facially invalid as a ban prohibiting distribution during both work and nonworktime. I find the rule valid as to employee solicitation but invalid on its face as to distribution. Moreover, Respondent has defined working areas broadly to include the entire rack area. The record has established that drivers consider the "rack" to include not only the actual loading area but also parking areas and the drivers' rooms. The record reflects that drivers take breaks in the drivers' room in Gallup during nonworktime while they are waiting to fuel their trucks. Similarly, in Bloomfield, drivers take breaks while waiting to fuel their trucks on the "ready line" before fueling their trucks at a bay on the loading rack. There is no evidence that Respondent's employees perform work inside the drivers' room at any of the terminals. Respondent has shown no special circumstance justifying the maintenance of its rule prohibiting employee distribution in nonworktime or nonwork areas in which employees take breaks, such as the drivers' rooms, and other nonwork areas, such as the bathrooms. Therefore, its no-distribution rule violates Section 8(a)(1) of the Act. *United Parcel Service v. NLRB,* 228 F.3d at 776.

Respondent's solicitation and distribution rule also prohibits nonworking employees from returning to "the Company premises until the next scheduled work time, unless he has prior approval from his supervisor."

Tri-County Medical Center, 222 NLRB 1089, 1089 (1976), is the standard for assessing the validity of an access rule. Under *Tri County,* a rule restricting off-duty employee access is valid if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

Here, that portion of Respondent's solicitation and distribution rule applicable to access is unlawful because it restricts access to the "company premises." The prohibition fails the first prong of the test as "company premises" includes nonwork areas, i.e., breakrooms, bathrooms, parking lots, and entrances to the terminals in violation of Section 8(a)(1) of the Act. In addition, the access rule requires that an employee receive "prior approval from his supervisor."

In *Marriott International', Inc.,* 359 NLRB No. 8, slip op. at 2 (2012), the Board applied *Lutheran Heritage Village-Livonia*, supra, 343 NLRB 646. to determine if the rule that required employees to get a supervisor's approval for access was valid. The Board determined that *Marriott's rule* was unlawful because the rule gave the employer absolute discretion to grant or deny access for any reason, including the discouragement of Section 7 activity. The Board found the provision to be unlawful since all access was prohibited without permission leading employees to conclude that they were required to disclose to the employer the nature of their activity for which they sought access—a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights.

Here, Respondent's employees could conclude that the access ban, without their supervisor's approval was a restriction of their rights under Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Respondent argues that this allegation is barred by Section 10(b) of the Act as this provision, as set forth in the former handbook, was not in effect during the 6 months preceding the date of the first unfair labor practice charge filed by the Union.

While Respondent maintains its handbooks on its internet portal, there is no evidence showing that the new rule was in fact communicated to the affected employees, or that they were informed that the old rules were being rescinded and that employees would now be free to engage in protected activity.

In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board held that:

> [U]nder certain circumstances an employee may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company,* 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation,* 228 NLRB 326. 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.,* 159 NLRB 1435, 1444 (1966); *Harrah's Club,* 150 NLRB 1702, 1717 (1965).

In the absence of such a showing, the old rule may still be considered. *MasTec Advance Technologies,* supra at 14; *Claremont Resort & Spa,* 344 NLRB 832 (2005); *Passavant Memorial Area Hospital*, supra, 237 NLRB 138.

Since there is no evidence herein that Respondent has unambiguously repudiated the rule from the former handbook and advised employees that it will not prohibit their Section 7 activities, the former rule may still be considered. I find that the former rule violates Section 8(a)(1) of the Act as set forth above.

3. The anti-loitering rule

Complaint paragraph 5(kk) alleges that Respondent's Giant and Western Refining have maintained an overly broad and discriminatory rule prohibiting loitering.

Respondent Western Refining Southwest, Inc., which operates the various Giant branded gas stations and markets, maintains a handbook for retail employees titled "Welcome to Western Refining Employee Handbook For Retail Store Associates."[27] The handbook, which was revised in 2011 contains the following rule on loitering:

> **Work Assignments & Scheduling**[28]
>
> . . . .
>
> Off-duty employees and non-employees, including family members, are not allowed in work areas and are not allowed to loiter on the store property. Only employees scheduled to be at work should be in the store prior to opening or after closing hours.

This rule was alleged as a violation of the Act in the complaint by amendment[29] on the first day of the trial. There was testimony at the hearing concerning the enforcement of a no loitering rule during union leafleting at Respondent's gas stations/retail stores in November 2011. Respondent's district manager, Susan Montoya, told Respondent's drivers and union organizers who were leafleting at various Giant gas stations that Respondent does not allow solicitations or loitering on the premises, and she ordered them to leave. Montoya told one of Respondent's drivers that it does not allow solicitation or loitering. The employee said that he worked for Respondent. Montoya replied, "[I]n that case, you know we don't allow loitering."[30] Montoya testified that the entire store property is considered a work area, including parking lots and bathrooms. Montoya specifically testified that she was enforcing both Respondent's loitering rule, and Respondent's no-solicitation rule, when she told the leafleters they had to leave the property.

Like the workplace access rules discussed above, this rule is assessed under *Tri-County Medical Center*, 222 NLRB at 1089, the Board analyzed the validity of a no-access rule by noting that such a rule is valid if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Except where justified by business reasons, a rule which denies off-

[27] GC Exh. 8.
[28] GC Exh. 8, at p. 2.
[29] GC Exh. 5.
[30] Tr. 62.

duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. In *Lutheran Heritage Village-Livonia*, 343 NLRB at 655, the Board found that a rule prohibiting "loitering on company property (the premises) without permission from the Administrator" violated Section 8(a)(1) of the Act because it would reasonably chill employees in the exercise of their Section 7 rights. The Board explained that "employees could reasonably interpret the rule to prohibit them from lingering on the respondent's premises after the end of a shift in order to engage in Section 7 activities, such as the discussion of workplace concerns." Id. at 649 fn. 16.

Here, Respondent's rule is not restricted to the interior of the facility, or working areas, but instead applies to the entire property, including break areas and the parking lot.

Respondent may not assert that the entire property of the gas stations is a work area. In *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000), the employer claimed that the entire property was a working area because employees, at times, cleaned and maintained the parking lot, and security guards patrolled the lot. The Board said that an employer may not declare its entire property to be a work area as this would, "effectively destroy the right of employees to distribute literature." Id. at 733.

Respondent argues that since there is no allegation in the complaint alleging Western Refining Southwest, Inc. as a Respondent, it can have no liability. I have dealt with this issue above and have found Western Refining Southwest, Inc. to be a Respondent in this litigation both by virtue of the single-integrated enterprise finding and actual notice to Respondent that it is a party.

Accordingly, Respondent's no-loitering rule in the employee handbook, violate Section 8(a)(1) of the Act.

B. Western Refining's Response to the Organizing Drive

1. The July 2011 interrogation of driver Ted Schneider

a. Facts

Soon after becoming aware its drivers were trying to organize a union, in early July 2011, Respondent Wholesale held a picnic for its employees at its Albuquerque warehouse. Present at the picnic were Goode, Proctor, Human Resources Manager Scott, and Western Refining Wholesale, Inc.'s distribution and operations manager, Steve Curtwright, together with many of Respondent's drivers, including Albuquerque driver Ted Schneider.

While at the picnic, Schneider had a conversation with Goode about Schneider's planned vacation to Europe. During the conversation, Goode asked Schneider if he had heard anything about the Union trying to get started, or about any union activity. Schneider replied, no, that a couple of drivers were complaining about pay.

b. The analysis

Complaint paragraph 5(e) alleges that in June or July 2011, Kevin Goode interrogated employees about their union activities.

The General Counsel contends that under the Board's rules in *Rossmore House,* 269 NLRB 1176, 1177 (1984), affd. sub nom. *UNITE HERE! Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985), that Goode's interrogation of Schneider is unlawful.

Respondent argues that Goode's conversation with Schneider falls far short of being unlawful interrogation. Respondent contends that since Goode did not ask Schneider about his union membership, sympathy, or activity, and he did not ask Schneider about the union membership, sympathy, or activities of any other employee, and did not ask any followup questions, and thus under *Rossmore House* the question was not coercive.

In *Rossmore House,* supra, the Board held that interrogations of employees about their protected activities are not per se unlawful, but must be evaluated under the standard of whether "under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." The Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and whether the employee is an open and active union supporter. *Norton Audubon Hospital,* 338 NLRB 320, 320–321 (2002).

In the instant case, Schneider was a driver, Goode the vice president of Western Refining Wholesale, Inc. They are not buddies who share the same workplace. Nor was Schneider at this time a well known union adherent. Simply by virtue of his senior management position Goode was in a position to intimidate Schneider. This question was asked upon the heels of Goode discovering he had a union organizing campaign on his hands and was designed to elicit information to discover the extent of the Union's organizing efforts. This was not an innocent remark made in passing. I find that Goode's interrogation of Schneider violated Section 8(a)(1) of the Act as alleged.

2. The July 9, 2011 interrogation of and creating an impression that driver Leroy Reggensberg's union activities were under surveillance

a. The facts

Around this same time on about July 9, 2011, Respondent held a picnic at a State park in McGaffey, New Mexico, near the Gallup refinery. In addition to drivers and their families, Respondent Wholesale's Gallup terminal manager, David Townsend, and Distribution and Operations Manager Steve Curtwright attended. Driver Leroy Reggensberg was present and had a conversation with Curtwright. Curtwright asked Reggensberg what he was doing at the picnic and asked why Reggensberg was leaving the Company. Reggensberg replied that he had to work to support himself. Curtwright said that Reggensberg was supposed to be having a union meeting at his house. Reggensberg said no because he was at the company picnic. Curtwright said he had heard that from Townsend.

According to Curtwright it was Reggesnberg who approached him and said that Curtwright must have heard from Townsend that he was having a union meeting at his house. Curtwright denied any knowledge of a union meeting. Townsend was not called as a witness.

Respondent argues that Regggensberg should not be credited because his affidavit is inconsistent with his testimony at hearing. However, there is no inconsistency as to the substance of what Curtwright or Townsend said. The fact that Reggensberg in his affidavit recalled the incident in one rather than two conversations with Curtwright may be due to the questions asked by the Board agent. Further, there is nothing inconsistent with the substance of Reggensberg's testimony concerning Townsend and Curtwright, only whether the conversation happened once or twice. I find no other substantial inconsistencies in Reggensberg's testimony. On the other hand, Curtwright denied knowing of any union activity by the drivers. However, by June 30, 2011, Curtwright was aware of union activity since on that date he was part of the email chain[31] where union activity by the drivers was discussed. Moreover, Curtwright's curiosity about Reggensberg's union activities was consistent with Goode's directive to his managers to find out what was going on concerning union organizing. Further, the failure to call Townsend leads me to conclude that his testimony would have been adverse to Respondent and consistent with Reggensberg's testimony. I will credit Reggensberg's testimony.

b. The analysis

Complaint paragraph 5(f) alleges that on about July 9, 2011, Respondent, through Steve Curtwright, (1) interrogated employees and (2) created an impression that their union activities were under surveillance.

The General Counsel argues that Curtwright's statement that Reggensberg was having a union meeting at his house was both interrogation of his union activities and created an impression Reggensberg's union activities were under surveillance. Respondent contends that with respect to the allegation of interrogation, there is simply no testimony from Reggensberg that he was questioned about anything. The General Counsel contends that an affirmative statement may be couched as a coercive question that violates the standard in *Rossmore House,* supra.

Curtwright's accusation that Reggensberg was having a picnic was designed to elicit a denial or affirmation from Reggensberg equivalent to an open ended question. In *Westwood Health Care Center,* 330 NLRB 935 fn. 21 (2000), the Board found that a supervisor's question about how an employee felt about the union could be construed as unlawful interrogation noting the Fifth Circuit's observation that: "unlawful interrogations may occur even when remarks are not 'couched as questions' if an employer agent makes statements that are 'calculated to elicit responses from employees about their union sentiments.'" *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993).

I conclude that Curtwright, at Goode's instructions, was attempting to discover what the Union was up to and to what extent they had made inroads among the drivers. There was no valid reason for Curtwright to have accused Reggensberg other than to compel a response and determine if he was a union adherent. Curtwright's statement could only be designed to elict

[31] Ibid.

information about the Union from Reggensberg. Given the senior position of Curtwright vis a vis driver Reggensberg, I find this statement was coercive interrogation and violated Section 8(a)(1) of the Act.

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295–1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

Here, without divulging his sources, Curtwright told Reggensberg that he was having a union meeting at his house that day. This left Reggensberg to speculate how Respondent got the information about the union meeting and would have left him to reasonably conclude that the information was obtained through employer monitoring when an employer withholds the source of the information. *Stevens Creek Chrysler*, 353 NLRB at 1296; *Conley Trucking*, 349 NLRB 308, 315 (2007). I find that Curtwright's statement also created the impression Reggensberg's union activities were under surveillance in violation of Section 8(a)(1) of the Act.

Complaint paragraph 5(g) alleges that on July 11, 2011, at the Gallup facility Respondent through David Townsend created an impression its employees' union activities were under surveillance.

I find no evidence to support this allegation and will recommend its dismissal.

3. The surveillance of the Union's truck at the Gallup truck stop

a. The facts

During the organizing drive in the fall of 2011, the Union parked a large semitruck and trailer with the union logo at a Pilot truck stop near Respondent's Gallup terminal and refinery. Respondent Wholesale also has an office on the same property as the Pilot truckstop. Respondent was aware that its drivers met union officials at the site of the union truck. During this period of time Curtwright observed an SUV parked about 80 to 100 feet from Respondent's office and he thought someone in the SUV was taking photos because the window was rolled down. Curtwright never explained why he thought photos were being taken or what was being photographed. Curtwright claimed that for security reasons, because there are females in the office and because Respondent is a hazardous materials company, he followed the SUV to the adjacent Pilot truckstop where he saw the occupants, including former employee Reggie Lemoine and union representatives, get out of the truck. Curtwright then went back to his office. A few minutes later when the SUV drove over to the union truck, Curtwright took a photo of the union truck with his cell phone and sent it to Proctor and Goode.

b. The analysis

Complaint paragraph 5(h) alleges that in October 2011 Respondent through Curtwright at its Gallup facility engaged in surveillance of employees' union activities by photographing a union trailer.

The General Counsel takes the position that Curtwright's photographing of the union truck was more than mere observation of open, public union activity.

Respondent contends that there is nothing about Curtwright's conduct that is unlawful citing *Roadway Express,* 271 NLRB 1238 (1984), and *Ordman's Park & Shop,* 292 NLRB 953 (1989).

The Board, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), held that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. However, photographing and videotaping clearly constitute more than "'mere observation"' because photographing creates fear among employees of future reprisals. Photographing in the mere "belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997). Also, the Board has held that making a video of vehicles involved in union activity without justification violates Section 8(a)(1). *Smithfield Packing Co.,* 344 NLRB 1, 3 (2004); *Quality Mechanical Insulation*, 340 NLRB 798, 814 (2003).

Here, Curtwright went beyond mere observation of open union activity when he took a picture of the union truck and the vehicles parked near it. There was no justification for Curtwright's action. There is no evidence that the union truck was trespassing on Respondent's property or that the individuals at the truck or in the SUV were engaged in any unlawful activity for which Curtwright could have been gathering evidence. The photographing could chill Respondent's employees' rights who regularly gathered at the truck.

Roadway Express and *Ordman's Park & Shop* are distinguishable. In those cases the Board held that respondents took photographs of nonemployee, paid pickets in order to preserve evidence of alleged trespass. The Board has held that where photographs are taken for the purpose of gathering evidence, and there is no showing of coercion of the employees, such photographing is not unlawful. Here, there is no evidence that anyone at the union truck was engaged in trespassing on Respondent's property or engaged in any unlawful activity that would justify gathering evidence.

I find that Curtwright's photographing the union truck violated Section 8(a)(1) of the Act.

4. July 2011 promise of and grant of benefits

a. The facts

After learning in June 2011 that Respondent 's drivers were trying to organize a union, Goode directed his management team, including Proctor and Pamela Scott, to talk to drivers to find out what was causing dissatisfaction among them. As a result of meetings with the drivers, it was discovered that the drivers were unhappy with their pay, administration of bonuses, and time spent at the loading rack.

According to Goode as a result of the information gleaned from the drivers, the management team:

A. As I said, we did our annual review of the marketplace to see what the market had done relative to compensation for the drivers. We looked at what was—you know, why they felt there was ambiguity relative to the bonus plan. We worked with the people at the Gallup refinery to see what we could do to alleviate congestion at the rack.

Q. You tried—in an effort to address those concerns, right?

A. Yes, sir.[32]

At a meeting of drivers in Albuquerque on July 26, 2011, Pamela Scott told the drivers that Respondent:

> Every few years we go out into the industry and evaluate our driver pay. Ah we're currently capturing market intelligence as it relates to driver pay. The reason we're doing it right now is that about a month ago the carriers went to transportation and said we are going to do a rate increase on you for the deliveries we're making for you. Chris went back and go "why" and they said supply and demand, we're having a hard time recruiting for drivers and this pay is going to go to our drivers. So what that did to me is, and transportation, was ok something is going on out in the industry, we need to get out there and see what's going on. So we're in the process of doing that right now. Once we've obtained the information and we have validated the information, we will look at our drivers pay closer to determine if we need to make some changes to it. We're committed to being one of the leaders in the industry. Three years ago when we did this we found that our drivers were at 15 to 20% above the market. Now we don't want to be at the top of the market, but we don't want to be at the middle or the bottom of the market either. We want to be close, you know, somewhere in the 75 percentile of the market, that's where we want to be. So once we do this evaluation we'll determine what we want to do, and then we'll um get back to you probably in 45 days and let you know what our findings are and let you know what we're going to do with it. OK. [33]

According to Goode, he has been conducting meetings at terminals with drivers since about 2007 or 2008. Goode talks to drivers at these meetings about the Respondent's financial results, what their growth plans are, or how Respondent is doing with market pressure. PowerPoint presentations of these meetings with drivers from 2008 to 2011[34] reflect various topics discussed but never compensation. At one meeting on April 2, 2009, in El Paso the PowerPoint presentation [35] reflects that a companywide bonus plan for all employees was on the agenda. There is no evidence that Respondent has ever used a drivers' meeting to announce it was considering granting a pay raise to its drivers prior to July 26, 2011.

Respondent Western Refining Wholesale, Inc. claims that it has had a practice of reviewing the wages and benefits of its employees on an annual basis since about 2008. Goode said that the annual review of wages and benefits begins around the end of May or beginning of June. General Counsel's Exhibit 65 is a summary of pay changes Respondent Wholesale has

[32] Tr. 562, LL. 6–14.
[33] GC Exh. 139.
[34] R. Exhs. 14–20.
[35] R. Exh. 19.

made since 2008. In August 2008, there was a standardization of drivers' pay after the acquisition of another company by Respondent resulting in some drivers' wage increases. There were no changes to drivers' pay in 2009. On April 1, 2010, drivers received a 3-percent pay increase that was announced through a March 30, 2010 memo.[36]

While Respondent contends that it performed an annual pay review, Colleen Redfearn, Respondent's human resources generalist in Bloomfield, New Mexico, one of the people responsible for creating the research to establish if Respondent Wholesale's drivers' pay rates were competitive in the industry, contradicted Goode and said that the wage reviews were conducted at 18-month intervals. In explaining the timing of the 2011 drivers' pay review Redfearn explained, "We tried to review them and look at it every year, never happened every year because of the formula that was involved in it, every 18 months, and that's what this is."[37] Redfearn said she began a wage review in March 2011. The review was not completed until the end of June or the first part of July 2011 when it was submitted to senior management.[38]

When the new pay rates for drivers were approved by Goode they were presented to the drivers in meetings at the terminals, including a meeting held on August 25, 2011, in Albuquerque, in a PowerPoint presentation[39] by Scott and Redfearn. At this meeting, it was explained that based upon the market survey, drivers would be receiving a lump-sum payout of 3 percent and transport drivers would receive a 2-percent payout and the mileage rates would be increased to .44 cents per mile for the day shift and .49 cents per mile for night drivers. The lump-sum payout, as explained by Goode, was the result of a corporatewide bonus paid to employees in June 2011 because of a wage freeze in 2010 for everyone except the drivers, who received an increase because of market conditions. When the bonus was announced, Goode said he withheld it from drivers because he was in the process of doing a market survey of driver pay. Once the market survey was completed and competitive adjustments made and calculated, Goode said that from a budgetary standpoint, there was money left over so he divided it up and gave a bonus of 2 percent to some and 3 percent to others as part of the 2011 pay increase.

In a memo[40] dated September 1, 2011, Respondent announced its wage increase to its drivers, effective September 8, 2011.

b. The analysis

Complaint paragraphs 5(i) through (l) allege that (i) on July 26, 2011, Respondent in Albuquerque promised employees increased benefits and pay; (j) on August 25, 2011, and; (k) September 1, 2011, reaffirmed those promises; and (l) on September 8, 2011, granted employees increased pay and benefits to dissuade employees from supporting the Union.

The General Counsel contends that the above actions violated Section 8(a)(1) of the Act as promises designed to thwart employees' Section 7 rights.

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[36] R. Exh. 32.
[37] Tr. 2179, LL. 9–11.
[38] R. Exh. 34.
[39] R. Exh. 35.
[40] GC Exh. 39.

Respondent counters that there was nothing improper about the wage increases given to its drivers as it has had a past practice of reviewing driver pay and granting periodic increases, nor were any promises of benefits made to Respondent's drivers. Respondent finally argues that the granting of a wage increase during an organizing campaign "is not per se unlawful where the employer can show that its actions were governed by factors other than the [organizing campaign]. . . . [A]n employer can meet this burden by showing that the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the [u]nion." *American Sunroof Corp.,* 248 NLRB 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981).

The Supreme Court has held that the promise of benefits by an employer during an organizational campaign has a coercive effect because employees understand that the source of benefits promised is the same source where future benefits are likely to come. *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409-410 (1964). As the Court stated, "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove." Id.

The Board in *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007), has held that although 8(a)(1) allegations are typically analyzed under an objective standard, an analysis under *Exchange Parts* is motive based. The Board must determine whether the record evidence as a whole, including any proffered legitimate reason for the wage increase and promotion offer supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with Section 7 rights.

In *Permanent Label Corp.*, 248 NLRB 118, 131 (1980), the Board found that a violation of Section 8(a)(1) may be found even if the promise of benefits is neither specific in nature nor as to when the promise may be implemented. Thus, the Board found the employer's promise that it would someday better itself and offer employees more constitutes a promise of future benefits in violation of Section 8(a)(1)of the Act. In *Hubbard Regional Hospital,* 232 NLRB 858, 870 (1977), a statement of the hospital board communicated to the nurses, saying that the board realized management mistakes had been made and it was willing to correct them and asked the nurses to give the board another chance, was held to be a promise of benefits in violation of Section 8(a)(1) because, "while the benefits promised were not spelled out, the message was nonetheless clear that the improvements would come if the nurses gave the hospital another chance, i.e., rejected the Union."

According to Goode and Redfearn, who conducted the survey on driver's pay, the survey began in March 2011, well before Respondent became aware of union organizing activity by its drivers. However, the fact that a survey was commenced in March 2011 is no guarantee that it was time for another raise. While there is no dispute that the driver's pay survey began in March 2011, the record is also clear that Respondent had no practice of granting annual wage increases. In fact from 2008 to 2011, there is a history of only two wage increases, the last of which occurred in April 2010. Since it had been just over a year since the last pay raise, it is unlikely another raise would have been given to the drivers so soon absent the Union's resurrection. This is consistent with both Redfearn's testimony and Scott's statement at the July 26, 2011 Albuquerque drivers' meeting that "[e]very few years we go out into the industry and evaluate our driver pay."[41]

[41] Ibid.

On July 26, 2011, within 1 month of discovering that its drivers were trying to organize, at a meeting of drivers in Albuquerque, Scott for the first time announced to drivers that Respondent was in the process of finding out what other carriers were paying their drivers. She said that once Respondent had this information they would look at the drivers pay closer to determine if they needed to make some changes to it. Scott said Respondent was committed to being one of the leaders in the industry. She said Respondent wanted to be near the top of the market in drivers' pay. Respondent had never before announced its intention to study driver's pay.

In *Rainbow News 12*, 316 NLRB 52, 62-63 (1995), the Board affirmed the administrative law judge who found that the announcement to employees by respondent's manager that he was aware that certain salaries were below "market value," and a comparability study was being done, but that the employer could not discuss such a program because of the pendency of the union's petition, constituted an unlawful implicit promise of benefits. Similar statements that he was aware of problems with pay, which were "being worked on," and assurances to employees that things would "get better" was an unlawfully implied promise of improved benefits. The implied promise is especially true where, as here, Respondent has no past practice of announcing wage surveys, but instead has simply implemented past wage changes with an announcement at the time of implementation. *General Dynamics Corp.*, 186 NLRB 978, 979–980 (1970).

I conclude that the announcement that Respondent was studying its driver's wage rates and wanted to be sure that it was a leader in the industry and, that their driver pay was near the top of all carriers, Respondent made an unlawful implicit promise of benefits. Respondent has failed to provide sufficient proof that the wage increases granted were part of an already established company policy and Respondent did not deviate from that policy upon the advent of the Union. I find Respondent in promising and granting increased pay to its drivers violated Section 8(a)(1) of the Act.

5. Goode's September 2011 letters to drivers

a. The facts

Commencing on September 14, 2011, the Union sent the first in a series of letters[42] to Respondent Wholesale identifying members of its organizing committee. After receiving the first letter, beginning on September 20, 2011, Goode sent a letter[43] to every employee identified as a union supporter. All of the letters state:

> On September 14, 2011, I received the attached letter from Moises L. Ortega President Teamsters Local 492 in reference to you assisting Teamsters Local 492 and 745 in their attempt to organize Western Refining Inc. I fully understand that your Union Activity is a protected concerted activity under Section 7 of the National Labor Relations Act.
>
> I'm not sure why Mr. Ortega felt it necessary to inform me of your rights. All Wholesale Employees have these same rights. Also, our employees have many resources available

[42] GC Exh. 37, p. 2.
[43] Ibid, p. 1.

to them if they feel their rights have been violated. A few examples of these resources are: Direct Supervisors, Field Managers, Human Resources Representatives, Human Resource Manager, VP of Human Resources or me.

We also have an employee Hot Line our employees can call in the event the employee wants to make the company aware of a situation and would like to remain anonymous. A complete investigation takes place of any such complaints that come to the Hot Line. As the Vice President of the Wholesale Division I take these complaints very serious, and I am very involved in the outcome of these investigations.

The facts of these investigations are held confidential to protect the interest of the involved parties. You can trust that corrective action is taken when an investigation shows that one of our employees has been threatened, harassed, intimidated or discriminated against.

Sometime in the fall of 2011 after the Union began sending their letters to Respondent identifying employees who were assisting the Union organize Respondent's drivers, Goode posted a letter[44] to all of the drivers in Albuquerque. The letter states:

TO ALL WESTERN REFINING DRIVERS

We have received numerous complaints that our drivers are being solicited by union organizers when they are working and that you want this interference and harassment to stop.

While we recognize the right of our drivers to join or not join a union as they see fit, everyone needs to remember that working time is for work, not solicitation. Our No-Solicitation Policy very clearly states that there is to be no solicitation of or by any employee when he or she is on working time. Solicitation for any reason must be limited to breaks, lunch time or before or after work. Violators of this policy are subject to disciplinary action.

Some of you have also told us that you have received threats because you refuse to support the union. Such threats are unlawful and will not be tolerated. If you are threatened, you can report it to the U.S. National Labor Relations Board at 505-248-5125. You can also report any misconduct to your supervisor or to Pam Scott in HR at 602-269-6501.

The record reflects that since Respondent became aware that its employees were organizing for the Union, it has used the word "harassment" interchangeably with union organizing, union talk, and union solicitation. In Goode's letter[45] to all drivers, above, he equates union organizer solicitation of drivers with "interference and harassment." Various emails[46] between Respondent's managers reflect that harassment is equated with prounion

[44] GC Exh. 36.
[45] GC Exh. 36.
[46] GC Exh. 76, pp. 1, 78, 103, 104.

employees discussing the Union with other employees. In emails[47] between Scott and Burnham regarding driver Kevin Taddy, the line between solicitation and talking was completely blurred by Scott. The emails[48] from Goode to Stevens, Rueda, and Scott regarding driver Roberto Aguirre refer to his "union activism while on duty" as a violation of company policy again blurring the lines between lawful talking and solicitation. The September 28, 2011 email[49] from Scott to Mike Gailey tells Gailey to admonish Aguirre from pushing union activities while he is on company time . . . and limiting his "talking" to other drivers to the breakroom when not working. Emails regarding driver Obie Frazier also demonstrate Respondent's lack of distinction between talking and solicitation. Thus, Scott tells Rueda that she warned Frazier about "talking union to other drivers at the rack while working."[50]

At the hearing, witness testimony further reflected managers and supervisors equated discussing the Union with harassment. Thus, Gailey accused driver Gilbert Mendoza of "harassing other drivers about going union."[51] Redfearn used the term "harassment" when drivers complained about Frazier approaching them about the Union.[52] However, from Redfearn's own notes[53] taken when interviewing two "harassed" drivers, it is clear that all Frazier did was talk to them about the Union. Redfearn along with the rest of Respondent's managers associated mere talking about the Union with harassment. There is no evidence in this record of any driver being threatened by any of Respondent's employees who supported the Union.

In an October 31, 2011 email[54] from Proctor to Respondent's supervisors and managers, he noted that it was important that driver committees continue to secure signatures. This was a reference to antiunion petitions that the LRI labor consultants Respondent had hired in October 2011 had recommended drivers sign, saying that they did not want the Union in order to avoid an election. The driver committee members, including Phillip Payne, asked Respondent's drivers, including Wendell Haggerty, at the drivers' room at the Gallup rack to sign the antiunion petition. LRI consultants distributed antiunion literature such as union guarantee coupons[55] to drivers at Respondent's facilities in October 2011. During October 2011, the LRI consultants walked around Respondent's facilities during worktime and initiated conversations with drivers about the Union.

b. The analysis

Complaint paragraph 5(m) alleges that Respondent through Goode in letters to employees (1) invited employees to report harassment by employees engaged in union activity; (2) solicited grievances; and (3) threatened employees with reprisals for engaging in union activity.

[47] GC Exh. 93.
[48] GC Exh. 76, p. 2
[49] GC Exh. 78, p. 1.
[50] GC Exh. 102.
[51] Tr. 1145, LL. 20–25.
[52] Tr. 2185, LL. 2–21.
[53] Tr. 2210, LL. 8–19.
[54] GC Exh. 49.
[55] GC Exh. 117.

The first two paragraphs of Goode's September 20, 2011 letter simply advise employees their Section 7 rights can be protected by complaining to Respondent's management. Like the handbook rule that suggested employees report threats to sign union cards to management which the Board found valid in *S.E. Nichols, Inc.*, 284 NLRB 556, 557 (1987), because it only advised employees that management would protect employees' Section 7 rights, Goode's admonition to employees that they could report violations of their rights to management is not reasonably subject to an interpretation that would unlawfully affect the exercise of Section 7 rights. I find that here, Goode's advice that employees report violations of their rights to management merely advised employees that the Respondent would be available to protect employees from conduct that might restrain or coerce them in the exercise of their Section 7 rights.

However, the remainder of Goode's letter deals with the "Hot Line" and it is unclear whether Goode, when he mentions "in the event the employee wants to make the company aware of "a situation," is referring to Section 7 rights. As a result of anonymously reporting a "situation" a complaining employee is assured, "You can trust that corrective action is taken when an investigation shows that one of our employees has been threatened, harassed, intimidated or discriminated against." The use of the terms "harassed" and "intimidated" is vague and ambiguous, particularly in the context of union organizing, and reasonably could encompass perfectly lawful union efforts to persuade or merely to inform employees about the asserted benefits of unionization. Indeed, the record reflects that Respondent has equated harassment with union activity in dealing with union advocates who have spoken with other drivers about the Union.

In *Mississippi Transport*, 310 NLRB 1339, 1344-1345 (1993), the employer told its drivers that "if you are harassed at the rack or while you are working about union activities I want to know immediately. When, where and who." The judge, with whom the Board agreed, found that the supervisor's solicitation to report about union activities if you are harassed at the rack or while you are working is plainly a dragnet response and unlawful, "because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities."

Respondent cites *Kingsboro Medical Group,* 270 NLRB 962, 963 (1984), for the proposition that an employer who has had a past policy and practice of soliciting employee grievances may continue such a policy and practice during a union's organizational campaign. *Mt. Ida Footwear Co.,* 217 NLRB 1011 (1975); *Reliance Electric Co.,* 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

Respondent Western Refining Wholesale, Inc. contends it has a longstanding policy of regularly soliciting and responding to employee questions or complaints and Goode's September 20, 2011 letter simply is a continuation of that policy. Respondent contends that this policy is embodied in its employee handbook[56] under the heading "Open Door Policy."

However, Respondent's Open Door Policy is simply the Company's grievance procedure. Respondent's Open Door Policy is designed as an internal means of resolving employee work disputes. Respondent cannot assert that a procedure is the same thing as actively soliciting

[56] GC Exh. 6, p. 35.

employee grievances. In addition, Respondent claims that its town hall meetings, held at its terminals, encompassed a question and answer period that shows Respondent encouraged employees to raise complaints. The primary purpose of the town hall meetings was to disseminate information to employees. While part of those meetings included receiving and discussing drivers' questions, no evidence was presented as to the nature of the questions that were asked by employees. There is no evidence as to what the nature of the questions were or whether Respondent was simply soliciting questions about the information presented at the meetings by management or whether Respondent was actually soliciting employees' grievances. Further, assuming for the sake of argument that Respondent had a longstanding policy of soliciting employee grievances, such a policy does not justify Respondent's solicitation of employees to report legitimate union activities of other employees.

Accordingly I find that Goode's invitation to use the Hot Line to report "situations" of "harassment" and "intimidation" when Respondent clearly associated harassment with union activity, was both an improper invitation to report employees' Section 7 activity, a solicitation of employee grievances as well as a threat of discipline against employees whose Section 7 activities were associated with harassment in violation of Section 8(a)(1) of the Act.

Complaint paragraph 5(s) alleges that Respondent through Goode in a letter to employees (1) threatened employees with reprisals for engaging in union activity; (2) reaffirmed; (3) enforced disparately its over broad no-solicitation rule in its employee handbook; and (4) threatened employees with discipline if they violated the no-solicitation rule in the employee handbook.

With respect to the letter[57] disseminated to drivers at Respondent's Albuquerque facility, the General Counsel contends that by equating harassment and interference with union solicitation, by setting forth Respondent's no-solicitation policy while discriminatorily permitting antiunion solicitation, and by warning employees that violations of this policy are subject to disciplinary action, the letter promulgates an overly-broad rule and threatens employees in violation of Section 8(a)(1) of the Act.

Respondent takes the position that the letter did not address an employee's right to talk about the Union rather, it is addressed to solicitation during working time and threats. Further, Respondent argues there is insufficient evidence to show that Respondent's facially valid no-solicitation policy was disparately enforced to the point of being unenforceable.

From the context of Goode's letter as well as from the language of complaint paragraph 5(d), the "No-Solicitation Policy" referenced in his letter was Respondent's solicitation and distribution rule, not its conflicts of interest rule.

In *Publix Super Markets, Inc.*, 347 NLRB 1434, 1451 (2006), the administrative law judge found that an employer's reading from the company rules that if an employee harasses someone, those are grounds for termination, and the employer's concomitant request that the employees come to him if they are harassed, was a violation of Section 8(a)(1) of the Act as there was no evidence that any employees were being harassed and constituted a request by the

[57] GC Exh. 36.

employer that employees report the union activities of other employees to him. *Bloomington-Normal Seating Co.*, 339 NLRB 191 (2003).

In *S.E. Nichols, Inc.*, 284 NLRB at557, the employer, during meetings with employees, advised employees to report harassment, threats, or trouble to management officials. The judge found that the employer's comments to employees demonstrated that he subjectively equated "harassment" with solicitation of union support and the employer's handbook reference to "freedom of choice" with the absence of such solicitation and that therefore the employer was inviting employees to report on union activities in violation of Section 8(a)(1).

In *Mississippi Transport*, supra at 1344–1345, the employer unlawfully told its drivers that "if you are harassed at the rack or while you are working about union activities I want to know immediately." The employer's solicitation to report about union activities if you are harassed is unlawful, "'because it has the' potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities."

Such subjectivity is evident here. Some drivers obviously interpreted the persistence of the union advocate as harassment. Others did not. When this is coupled with Respondent's implied willingness to intervene such that employees, ". . . can also report any misconduct to your supervisor or to Pam Scott in HR. . . ." the message becomes clear. Employees choosing to lawfully promote the Union in the course of their routine contacts with other employees would be doing so at the risk that their activities might be misconstrued and that management retribution might result. I find that any such message would reasonably tend to interfere with employee protected activity. Hence, Goode's solicitation about reporting union activity in Goode's letter TO ALL WESTERN REFINING DRIVERS is an unlawful violation of Section 8(a)(1) of the Act.

Respondent issued the above letter in response to union activity and drivers' complaints of harassment without a meaningful investigation to determine if the drivers' complaints were a reaction to lawful but persistent exhortations to support the Union. At the same time Respondent, through the LRI consultants, as discussed below, was permitting nonunion solicitation and was allowing employees to solicit signatures on an antiunion petitions. Therefore, Goode's letter constitutes the discriminatory enforcement of what I have found to be a facially valid no solicitation rule and violates Section 8(a)(1) of the Act. *Reno Hilton Resorts*, 320 NLRB 197, 208 (1995).

The reference in the letter to violators of Respondent's no-solicitation policy being subject to disciplinary action constitutes a threat of reprisal for violation of the discriminatorily applied policy in violation of Section 8(a)(1) of the Act.

Having found Respondent's solicitation rule, cited in complaint paragraph 5(d) of the complaint, facially valid, it follows that the letter's reference to that rule is not a violation.

6. The September 2011 threats, surveillance, and limitation of employee solicitation by Respondent's Albuquerque terminal manager, Burnham

a. The facts

On September 20, 2011, Scott sent Respondent Wholesale's Albuquerque terminal manager, Eric Burnham, an email[58] directing him to tell Albuquerque driver Kevin Taddy:

> We have had a couple driver (sic) come and tell us you have been handing out Union literature and talking Union while they were working and you were working, this is a misuse of company time and resources.
> This is a violation of our Company no solicitation policy.
> This is a safety violation, you are distracting them at the rack and this could lead to a accident of some type.
> The next time this happens you will be sent home

On September 21, 2011, Scott followed up with another email[59] to Burnham advising:

> Stick to the points below, he might want to go into while is he on his own time, stick to the point he was working while he was handing out literature and talking Union which is a violation, do not go into while on his own time, he is a trip driver not hourly and was on company time.

On September 22, 2011, Burnham and fellow Albuquerque Terminal Manager Jonas Armenta, neither of whom were called as witnesses, met with Taddy. Burnham told Taddy that HR had got complaints about him harassing drivers and trying to hand out union pamphlets on the rack.[60] Burnham told Taddy he could not do that because he could have the drivers mess up doing their job. Burnham said if he continued this activity he could get sent home or have days off. Burnham told Taddy he could not be doing this on company time but he could do whatever he wanted when he was off and on his own time.

Later that day, Burnham sent Scott an email[61] advising her of what he had told Taddy:

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[58] GC Exh. 93, p. 2.

[59] Ibid at 1.

[60] There was considerable testimony about "the rack." The rack technically refers to where Respondent's drivers fill their trucks with various grades of fuels produced by Respondent's refineries. Narrowly speaking, the rack is the area with several islands with hoses that are attached to the trucks for filling and for offloading excess fuel. However, the drivers in this proceeding have also referred to "the rack" in a broader way as the entire area around the filling area to include the "blue line" some distance from the islands where drivers wait their turns to load, the guard shack, the drivers' room where drivers can sit and wait their turn to load, and the general parking area around the drivers' room and guard shack. There is no evidence that any of Respondent's managers, when discussing "the rack" with drivers, described what they meant by "the rack." Given this ambiguity about what constituted the rack, drivers could reasonably assume that Respondent's managers were referring to the entire property surrounding the loading area, including the guard shack, drivers' room, blue line, and parking area.

[61] Ibid.

> Jonas Armenta and I met with Kevin Taddy and covered the following points as instructed.
>
> 1. The fact that we had received complaint (sic) of him handing out Union literature and talking union while on duty.
> 2. Made it clear to him that this was a violation of our company policy.
> 3. Discussed that this was a safety violation if occurring on the rack.
> 4. Explained that if it occurred again he would be sent home.
>
> His response was that he knew the rules and has not been handing out Union papers on duty. . . . I explained that while on duty he cannot discuss the union or be involved in union activities. I further explained what on duty entailed.

Scott admitted that she did not speak directly with any drivers, but thinks they went to Burnham and complained to him about Taddy. Further, the record is replete with evidence of drivers talking about a plethora of subjects while working.

Complaint paragraph 5(n) alleges that in September 2011, Respondent's supervisor, Eric Burnham (1) threatened employees with reprisals for engaging in union activities; (2) created an impression that employees' union activities were under surveillance; and (3) enforced the rule in paragraph 5(d) (solicitation and distribution) disparately.

b. The analysis

In his discussion with Taddy on September 22, 2011, Burnham told Taddy that HR had gotten complaints that he had been harassing drivers and trying to hand out union pamphlets at the rack. Burnham's statement creates an impression that his union activities were under surveillance because Burnham withheld Respondent's source of information. The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295–1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

Here, without divulging his sources, Burnham told Taddy human resources had gotten complaints that he had been harassing drivers and trying to hand out union pamphlets at the rack. This left Taddy to speculate how Respondent got the information about his union activities with other drivers and would have left him to reasonably conclude that the information was obtained through employer monitoring. This conduct violated Section 8(a)(1) of the Act. *Stevens Creek Chrysler*, 353 NLRB at 1296; *Conley Trucking*, 349 NLRB 308, 315 (2007).

In addition, Burnham's statement that next time Taddy engaged in "union talk" or "handing out Union literature and talking union while on duty" he would be "sent home or have some days off" was both a threat and overly-broad enforcement of Respondent's no-solicitation rule. Threatening Taddy with time off for engaging in talking about the Union and engaging in union activities violated Section 8(a)(1) of the Act. *Mid-South Mfg. Co.,* 120 NLRB 230, 248 (1958).

Further, Respondent disparately enforced its solicitation rule set forth in complaint paragraph 5(d) upon Taddy by telling him he could not talk union or engage in union activity while on duty, while at the same time permitting drivers to talk about a wide range of other subjects. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006); *Boulder City Hospital*, 355 NLRB 1247, 1249 (2010). The record is replete that other forms of solicitation occurred at Respondent's facility such as a raffle, and the sale of candy bars. Moreover, as noted above, Respondent permitted drivers to solicit signatures for an antiunion petition through an employee committee. Burnham's conduct violated Section 8(a)(1) of the Act.

7. The surveillance, threats, and limitation of employee solicitation by Respondent's El Paso terminal manager, Mike Gailey

a. The facts

(1) The September 28, 2011 warning of Aguirre

On September 28, 2011, El Paso Terminal Manager Mike Gailey sent an email[62] to Scott advising that two of his new drivers contacted him about being talked to and possibly harassed by the two drivers initiating the union project. Gailey identified El Paso driver Roberto Aguirre as one of two drivers involved in initiating interest in the Union. On September 28, 2011, Scott responded with an email[63] to Gailey advising him to:

> Please bring Roberto in and talk with him about pushing Union Activities while he is on Company time and while the other drivers are working and on Company time. Let him know he can only talk to other drivers at the terminal in the break room when he is not working and when the other Drivers are not working.
>
> Let Roberto know this is a verbal warning, and make sure he understands this will not be tolerated and next time he will be sent home.

At the end of September 2011, Respondent Wholesale driver Roberto Aguirre was at the El Paso terminal yard near his truck getting ready to go home when Gailey came up to him. Gailey said that Aguirre had been harassing a driver about the Union. Aguirre denied he had harassed any driver and demanded that the driver come forward and meet with Aguirre. Gailey admitted that Aguirre questioned Gailey's source of information to which he responded, "I don't reveal my sources and I will not reveal my sources." Gailey told Aguirre he could not talk about the Union while he was working or while loading/offloading at the rack. In a followup email[64] to Scott, Gailey confirmed that he told Aguirre that he was not allowed to push union activities on company time. Gailey told Aguirre this was a verbal warning and this would not be tolerated. On cross-examination, Aguirre stated that Gailey told him he could not talk about the Union or mention the Union. There was some confusion on Aguirre's part, when in response to the leading question, "Did he say—did he tell you that you couldn't solicit for the union on company time?" Aguirre responded, "Yes." Again in response to another leading question, "Did he tell

[62] GC Exh. 78.
[63] Ibid.
[64] GC Exh. 77.

you that if you were going to solicit for the union that you were to do it in the break room when you were not working and the other drivers are not working?" Aguirre stated, "I believe so."[65]

Gailey admitted that he had a conversation with Aguirre about driver complaints. According to Gailey, two drivers came to him and complained that Aguirre had harassed them at the loading rack in an effort to get them to sign union cards. The location, as described by Gailey, was at the "blue line" at the El Paso loading rack which is an area where drivers wait in their parked trucks to load. Gailey identified these drivers as Sergio Bustillos and Adrian Trillo. Trillo told Gailey that Aguirre had gotten into the cab of his truck and told him he had to sign a union card because he had 16 points and that the Union would back him up or he would get fired as soon as something happened. Trillo also told Gailey that Aguirre hit him in the shoulder with his finger. Neither Bustillos nor Trillo testified.

Based upon Scott's orders to Gailey to tell Aguirre that he could not push union activities on company time and that he could only talk to other drivers at the terminal in the breakroom, I credit Aguirre's testimony that he was told by Gailey that he could not talk about the Union on company time. The use of the word solicit was counsel's not Aguirre's.

(2) The October 20, 2011 warning to Aguirre

On October 7, 2011, Gailey sent Scott, Proctor, and Curtwright??? an email informing them that Trillo reported a conversation he had with union activists on the loading rack on "Thursday 10-6-11."[66] Gailey notes that Trillo said, "[H]e told Jaime Holguin that he was not going to sign up and not to bother him again about this."

Three days later, on October 10, 2011, Scott emailed Gailey with instructions to search for "written statements from drivers who said they were being harassed by Pro Union Drivers."[67] Scott indicated the "reason is that they would need to be soliciting for the Unions when they were talking with drivers," and that the written statements should identify "where and date and time." Respondent did not produce any driver statements accusing Aguirre of harassment.

On October 20, 2011, Scott had a telephone conversation with Aguirre to discuss his union activities. During this call, Scott told Aguirre that it had been brought to her attention that he continued to harass drivers about the Union, and that Respondent would not tolerate such conduct. Aguirre said that this was not true, but Scott continued, accusing Aguirre of getting "out of hand," scaring Gailey, and cursing in front of an office worker. During this call, Scott admitted that she told Aguirre that "you cannot talk about union on company property while you're on company time."[68] Scott confirmed in an email[69] that she told him that the next time she spoke with him "it will not be as pleasant of a conversation."

[65] Tr. 1234, LL. 8–15.
[66] GC Exh. 66.
[67] GC Exh. 104.
[68] Tr. 2449.
[69] GC Exh. 109.

(3) The warning to Holguin

At some unspecified time in the fall of 2011, Gailey had a conversation at the El Paso warehouse with El Paso driver Gilbert Mendoza. Gailey told Mendoza that he heard Mendoza had been harassing drivers about going union. Gailey told Mendoza not to be doing this anymore or he could get in trouble and get terminated for it. Gailey denied having this conversation with Mendoza.

Mendoza's testimony is consistent with that of Roberto Aguirre. Contrary to Respondent's unfounded suggestion that Mendoza and Aguirre were complicit in fabricating their testimony, I find their consistency suggests they were telling the truth. I will credit Mendoza.

b. The analysis

Complaint paragraph 5(o) alleges that from the third week in September 2011 through the end of September 2011, Respondent through Supervisor Mike Gailey (1) created an impression that its employees' union activities were under surveillance; (2) engaged in surveillance of employees' union activities; (3) disparately enforced the solicitation and distribution rule in complaint paragraph 5(d); (4) orally promulgated an overly broad, discriminatory rule prohibiting employees from discussing the Union; and (4) threatened employees with reprisals for engaging in union activity.

Respondent contends that under *Bridgestone Firestone South Carolina,* 350 NLRB 526 (2007), there is no impression of surveillance since Gailey divulged his source. However, contrary to Respondent's contention, Gailey refused to divulge who he had spoken to, saying, "I don't reveal my sources and I will not reveal my sources." *Bridgestone* is distinguishable. Unlike the facts in *Bridgestone*, Gailey did more than merely inform Aguirre that his coworkers had volunteered information about ongoing union activities. Gailey refused to identify those employees. This case is more analogous to *Promedica Health Systems, Inc.,* 343 NLRB 1351,1352 (2004), where the Board found an impression of surveillance had been created by a supervisor where the supervisor said that someone had complained about an employee soliciting "something" about the union. When the employee asked the supervisor who had made the complaint, the supervisor replied that she was not comfortable naming the person.

When Gailey told Aguirre he had been harassing a driver about the Union without divulging his source, Gailey created an impression that Aguirre's union activities were under surveillance in violation of Section 8(a)(1) of the Act. *Promedica Health Systems, Inc.,* 343 NLRB at1352; *North Hills Office Services*, 346 NLRB 1099, 1103 (2006).

Disparate application of an otherwise valid no-solicitation rule that prohibits union organizational solicitation while permitting other nonunion solicitation, also violates 8(a)(1) of the Act. *SNE Enterprises, Inc.,* 347 NLRB 472, 473 (2006). The record reflects that Respondent's drivers were permitted to discuss a wide range of topics while working. However, when Gailey told Aguirre he could not talk about the Union on company time, he not only disparately applied Respondent's solicitation policy against Aguirre he also discriminatorily promulgated a rule prohibiting talking about the Union when drivers could talk about a whole

host of other topics in violation of Section 8(a)(1) of the Act. *Fresh & Easy Neighborhood Market, Inc*., 356 NLRB No. 90, slip op. at 4–5 (2011).

When Gailey told Aguirre that he was being given a verbal warning for talking union on company time and that it would not be tolerated, this constituted an illegal threat in violation of Section 8(a)(1) of the Act. Threat of discipline for violating an unlawful no-solicitation rule violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages, or other working conditions if they support the Union. *Gifford-Hill & Co.,* 188 NLRB 337 (1971); *SNE Enterprises, Inc.,* 347 NLRB at 473.

I find no evidence of surveillance by Gailey and will recommend dismissal of complaint allegation paragraph 5(o)(2).

Complaint paragraph 5(t) alleges that in October 2011, Respondent, through Supervisor Mike Gailey (1) disparately enforced the solicitation and distribution rule set forth in complaint paragraph 5(d); (2) promulgated an overly broad and discriminatory antiharassment rule; (3) enforced its antiharassment rule disparately; and (4) threatened employees with reprisals if they violated the antiharassment rule.

By telling Mendoza that he heard Mendoza had been harassing drivers about going union without divulging any source, Gailey created an impression that Mendoza's union activities were under surveillance. *Promedica Health Systems, Inc.,* 343 NLRB at1352; *North Hills Office Services*, 346 NLRB at1103.

When Gailey told Mendoza that he could get terminated if his harassment of drivers about going union didn't stop, Gailey illegally threatened Mendoza with discipline and termination if he continued in his union activities. *SMI Steel, Inc.*, 286 NLRB 274, 287 (1987); *Swardson Painting Co.*, 340 NLRB 179, 185 (2003).

When Gailey told Mendoza that he heard Mendoza had been harassing drivers about joining the Union and to stop or he could get in trouble and get terminated for it, he both promulgated an overly-broad and discriminatory rule prohibiting employees from engaging in lawful union activity, and enforced disparately an overbroad application of the lawful solicitation policy in the employee handbook in violation of Section 8(a)(1) of the Act. *Boulder City Hospital*, 355 NLRB 1247, 1248 (2010).

8. The September 23, 2011 threats and enforcement of Respondent's no-solicitation rule by Scott

a. The facts

On about September 23, 2011, Respondent's Bloomfield driver Obie Frazier was called to a meeting with Scott and Redfearn. Redfearn said she had reports of Frazier talking union business on the rack and that this was not allowed. At the hearing, Scott admitted she told Frazier some drivers had brought to Milton's attention that he was soliciting for the Union out at the rack on company time and in safety sensitive areas and he needed to quit doing that. Frazier asked Redfearn for the names of the drivers so that he could apologize to them if he had offended them. However, Redfearn refused to disclose the names of the drivers to Frazier. Scott reaffirmed that

Frazier was not allowed to talk on the rack because this was a safety sensitive area and someone might make a mistake. Frazier's testimony is consistent with Scott's language used in emails to Burnham and Gailey, supra. Frazier's testimony is also consistent with Scott's email[70] of October 7, 2011, in which, she states she warned a Bloomfield driver 2 weeks ago about talking union to other drivers at the rack while working. Scott told Frazier if she had to talk to him again it would be "more serious consequences." According to Redfearn, two drivers said Frazier was harassing and pressuring them at the rack and talking to them about joining the Union. The drivers said Frazier was also handing out flyers. From a chain of emails between Scott and Respondent's other managers[71] trying to get these drivers to give statements about what Frazier said, it is clear that no one at Respondent had any idea what Frazier was saying to other drivers at "the rack" or what area of the rack the two drivers were referring to where Frazier was "harassing" them. Indeed, Redfearn admitted -when speaking to the two drivers who accused Frazier of harassing them - Redfearn failed to ask them if by the rack they meant the area where fueling actually takes place or where they waited in line to load or in the drivers' lounge. I credit Frazier's version of this conversation.

In an October 10, 2011 exchange of emails[72] between Scott Stevens, vice president of wholesale/marketing for Western Refining Southwest, Inc. and Western Refining Wholesale, Inc's Scott, Rueda, Redfearn, and Rusty Royce it is clear that Respondent's have no clue what Frazier has been doing in terms of talking to drivers or where his conversations with drivers have occurred. The emails demonstrate a lack of knowledge as to what drivers were complaining Frazier was doing:

> "Scott Stevens is asking me if we got the written statements from the drivers who said they were being harassed by Pro Union Drivers, we would *need the exact words of what they were being asked by these Pro Union Drivers*, the *reason is that they need to be soliciting for the Unions when they were talking with drivers*? Also *where* and *date* and *time* [sic]."[73]

No drivers gave statements about Frazier's union activity.

b. The analysis

Complaint paragraph 5(p) alleges that on about September 23, 2011, Respondent through Redfearn and Scott (1) reaffirmed and disparately enforced the solicitation and distribution rule cited in complaint paragraph 5(d); (2) promulgated an overly broad, discriminatory rule prohibiting employees from talking at the rack; and (3) threatened employees with reprisals because they engaged in union activity.

While not alleged in complaint paragraph 5(p), the General Counsel contends that Redfearn and Scott's statements to Frazier that Respondent had reports of him talking union business at the rack creates an impression that Frazier's union activities were under surveillance.

[70] GC Exh. 103.
[71] GC Exhs. 103, 104.
[72] GC Exhs. 103, 104.
[73] GC Exh. 104.

The General Counsel contends that this allegation is closely related to the allegation in paragraph 5(z) and was fully litigated by the parties.

Complaint paragraph 5(z) alleges that on about October 20, 2011, during a phone call, Scott created an impression employees' union activities were under surveillance. Complaint paragraph 5(z) relates to Scott's telephone conversation with Respondent's El Paso driver Roberto Aguirre. During this call, Scott told Aguirre that it was brought to her attention that he continued to harass drivers about the Union, and that Respondent would not tolerate that. I find that complaint paragraph 5(z) alleges that Scott created an impression of surveillance and put Respondent on notice that the General Counsel was alleging that Scott created an impression of surveillance. Further, the matter regarding surveillance of Frazier was fully litigated and Scott admitted that she told Frazier she had heard some drivers had brought to Milton's attention that he was soliciting for the Union out at the rack on company time. I will consider the General Counsel's contention that Scott created an impression of surveillance with Frazier. *Fremont Medical Center,* 357 NLRB No. 158, slip op. at 2 (2011).

It is undisputed that Scott told Frazier some drivers had brought to Milton's attention that he was soliciting for the Union out at the rack on company time and in safety sensitive areas and he needed to quit doing that. (Tr. 961.) When Frazier asked Redfearn for the names of the drivers so that he could apologize to them if he had offended them, Redfearn refused to disclose the names of the drivers to Frazier. (Tr. 1332.)

Respondent contends that since Scott told Frazier drivers complained he was soliciting under *Bridgestone Firestone South Carolina,* 350 NLRB 526 (2007), no impression of surveillance was created. As discussed above, Redfearn's refusal to name the complaining drivers under *Promedica Health Systems, Inc.,* 343 NLRB 1351,1352 (2004), created an impression Frazier's union activities were under surveillance in violation of Section 8(a)(1) of the Act.

The General Counsel also contends that Respondent reaffirmed and enforced its solicitation and distribution policy against Frazier in a disparate manner in violation of Section 8(a)(1) of the Act. As discussed above, I have concluded that Respondent's solicitation rule is facially valid. However, the record is replete with evidence that Respondent permitted and encouraged antiunion solicitation by LRI consultants during worktime in work areas, as well as employee solicitation of an antiunion petitions. Moreover, there is evidence that Respondent permitted drivers to talk about a wide range of subjects while at the rack. Thus, I find that Respondent disparately enforced its facially valid solicitation rule in violation of Section 8(a)(1) of the Act by telling Frazier he was not allowed to talk union at the rack. *Fremont Medical Center,* 357 NLRB No. 158, slip op. at 2. In addition, telling Frazier he was not allowed to talk about the Union at the rack on company time, constitutes the promulgation of an overly-broad rule prohibiting solicitation in violation of Section 8(a)(1) of the Act since it goes beyond working time. *Fremont Medical Center,* supra*; Orval Kent Food Co.,* 278 NLRB 402, 407 (1986).

By telling Frazier that if she "had to talk with him again it would be more serious consequences" constituted a threat of further reprisals for engaging in union activity in violation of Section 8(a)(1) of the Act. *SMI Steel, Inc.*, 286 NLRB at 287; *Swardson Painting, Co.*, 340 NLRB at 185.

9. The September 27, 2011 threats and interrogation by Gailey

a. The facts

In late September or early October 2011, El Paso driver Jaime Holguin had a conversation with El Paso Terminal Manager Gailey after Holguin had finished work. Holguin had gone into the warehouse office to leave his paperwork. Gailey came up to Holguin and said if the Union was to come in the Company would either close down or bring down our wages to minimum wage and that the Union was no good for the Company. At about this same time in the parking lot of the El Paso terminal, Gailey had a similar conversation with Respondent's El Paso driver Gilberto Mendoza. Gailey came up to Mendoza and said if the Union comes in, we all should know then the carrier or the Company will just end up selling off or closing the transportation part of the Company and just get carriers to haul the fuel. Gailey denied these conversations with Holguin and Mendoza.

Respondent suggests that Mendoza and Holguin's testimony should be discredited. Respondent *seems to think that because Holguin and Mendoza's testimony is similar, like the similar* testimony of drivers Aguirre and Mendoza, it must have been fabricated. The other consideration is that it is similar because it is true. In the absence of a reason to find their testimony was concocted, I choose to credit it. Nor did I find Gailey particularly credible. Gailey initially testified that he did not have any conversations with Holguin about the Union. However, on cross-examination, he admitted that around the same time period Holguin approached Gailey and told him that he had signed a union card. Unbelievably, given Respondent's efforts to discover who was supporting the Union, Gailey claims that he said nothing to Holguin in reply.

b. The analysis

Complaint paragraph 5(q) alleges that on about September 27, 2011, Respondent through Gailey (1) threatened its employees with lower wages if they selected the Union; (2) interrogated its employees about their union activities; and (3) informed its employees it would be futile to select the Union as their bargaining representative.

Gailey's statement to Holguin that Respondent would either close down or reduce wages if the Union came in, constitutes an illegal threat to reduce wages, and a threat of plant closure. *Days Inn Management Co.*, 299 NLRB 735, 743 (1990), enfd. in pertinent part 930 F.2d 211, 215 (2d Cir. 1991); *Roney Plaza Management Corp.*, 310 NLRB 441, 444 (1993); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1092, 1096 (2004). Moreover, Gailey's statement also constitutes a threat of futility as it implies that Respondent will use unlawful means to remain non-union. *Winkle Bus Co.*, 347 NLRB 1203, 1205 (2006).

Finally, the General Counsel contends that, by abruptly stopping Holguin and raising questions about the Union, Respondent engaged in an illegal interrogation. *Vemco, Inc.*, 304 NLRB 911, 922 (1991). While I concur that Gailey's statements to Holguin were unlawful threats of plant closure, they were not interrogations. In *Vemco* the supervisor preceded threats to close the plant with actual questions about union activity and is distinguishable from the facts herein. I will recommend dismissal of complaint paragraph 5(q)(2).

Complaint paragraph 5(v) alleges that in October 2011, Respondent through Gailey threatened its employees with plant closure and with discharge if they selected the Union as bargaining representative.

When Gailey told Mendoza that if the Union comes in Respondent will just end up selling off or closing the transportation part of the Company and just get carriers to haul the fuel, Gailey threatened employees with plant closure and discharge. *Holly Farms Corp.*, 311 NLRB 273, 298 (1993); *MPG Transport, Ltd.*, 315 NLRB 489 fn. 1 (1994).

10. Respondent hires the Labor Relations Institute labor consultants

a. The facts

In an effort to discover who was supporting the Union, in October 2011, Respondent hired consultants from the Labor Relations Institute (LRI).[74] In the contract between LRI and Respondent, LRI revealed Respondent's objective in hiring them: "We will be able to assess overall vulnerability and by communicating directly with employees we get a solid read on whether union organizing activity has gained traction." The LRI consultants questioned employees, and created almost daily spreadsheets that they passed on to Respondent, ranking each driver's support or opposition to the Union on a scale from 1-5.[75]

b. The agency status of the LRI consultants

Respondent has denied the allegation of complaint paragraph 4(b) that the LRI consultants acted as its agents. The terms of the LRI contract with Respondent reflects and the record supports that LRI's consultants conducted "inoculation" meetings with drivers "to assess union vulnerability and communicate your message directly to employees."[76] One of its stated objectives was to, "Provide a credible subject matter expert who immediately increases your capacity to legally and persuasively respond to potential union organizing activity." The record reflects that LRI accomplished these goals for Respondent by conducting both group meetings and one-on-one sessions with drivers. Respondent gave the LRI consultants Respondent's cell phones. As noted below, some of the LRI consultants asked employees what problems they had with Respondent and represented that they could fix these problems. They also introduced themselves as members of management or supervisors, and appeared with management officials at mandatory safety meetings.

c. The law of agency

Respondent has denied that the LRI consultants were Respondent's agents, however, the overwhelming evidence shows otherwise. Whether someone acts as an agent under the Act is determined by common-law principles of agency. *Shen Lincoln-Mercury-Mitsubishi, Inc*., 321 NLRB 586, 593 (1996). Agency encompasses both implied and apparent authority. Apparent authority is created through a manifestation by the principal to a third party that supplies a

[74] GC Exh. 111, pp. 5–6.
[75] GC Exhs. 51, 67, 71–74.
[76] Ibid.

reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question. The principal must either intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize this conduct is likely to create such belief. Where, under all the circumstances, employees would reasonably believe that somebody is reflecting company policy and acting on behalf of management, agency status is established. *Three Sisters Sportswear Co.*, 312 NLRB 853 864–865 (1993).

Labor relations consultants hired by an employer to convey its message directly to employees, are considered to be agents of the employer, and, thus, statements made by them can be attributed to the employer. *Acme Bus Corp.,* 320 NLRB 458, 460 fn. 4 (1995). Here, under the terms of the contract between the parties, the LRI consultants communicated Respondent's message about unions directly to drivers through both group meetings, and during one-on-one sessions. The LRI consultants asked employees what problems they had with the Company, and told employees they could fix these problems. They also introduced themselves as members of management or supervisors, and appeared with management officials at mandatory safety meetings. I find that the LRI consultants were agents of Respondent, and Respondent is responsible for their actions and statements. *Fieldcrest Cannon, Inc.,* 318 NLRB 470 (1995); *Allegany Aggregates*, 311 NLRB 1165 (1993).

d. The solicitation of grievances, promise of benefits, threats, and interrogation of employees in October 2011 in Albuquerque by LRI consultant William ("Scotty)" Scott

There is no evidence that LRI consultant William Scott was in Gallup in September 2011. However, the evidence shows that Scott was at Respondent's Albuquerque facility from October 16-19, 2011, conducting both individual and group meetings with drivers. Albuquerque driver Ray Dazhan attended a mandatory drivers' safety meeting with William Scott, Western Refining Wholesale, Inc.'s general manager of distribution/transportation, Procter, and Western Refining Wholesale, Inc.'s distribution and operations manager, Curtwright. Scott asked drivers why they were upset with Respondent, what was wrong with Respondent, and he said that he had the power to fix what was wrong if the drivers were just to tell him. Dazhan started asking Scott questions, and Scott replied that the Union wouldn't do anything for them, and they would have to pay dues. Dazhan asked Scott why Respondent was giving new drivers the same amount of bonus as more experienced drivers.

According to driver Ted Schneider, Scott also told employees that they could possibly lose their 401(k) and medical benefits if they unionized, and that if they got a contract it could be tied up for years in litigation. Scott also told employees that they could be fired for any reason.

Albuquerque driver Gustavo Gonzalez had a conversation with Scott in the fall of 2011 in the drivers' lounge in Albuquerque. Scott asked Gonzalez what the problems were at Western, and Gonzalez complained to him about Respondent's management. Scott replied that if you guys give us a chance to fix them, we'll be able to fix the problems. That way you won't need the Union to come in. Scott told Gonzalez he was fixing a form for drivers to sign, stating that they did not want the Union here. While Respondent suggests that Gonzalez was merely parroting the language of a 2008 letter[77] the Union had sent to Respondent's drivers, this

[77] GC Exh. 31.

suggestion is without foundation. Gonzalez did not work for Respondent until 2011 and there is no evidence Gonzalez ever saw this letter.

Albuquerque driver Dean Perry and other drivers also attended a meeting with Scott in October 2011 in the drivers' room in Albuquerque. Scott said he was a supervisor from Phoenix. Scott asked the group what their concerns were.

Scott denied interrogating any employees, soliciting grievances, promising to remedy employee's complaints, saying that employees could lose their benefits, or that employees could be fired for any reason.

I found the driver's' testimony consistent and corroborative of each other that on multiple meetings with drivers LRI consultant William Scott solicited their complaints about Respondent and promised to remedy those complaints. I find it is more likely that, in doing his job for Respondent to "inoculate" the drivers against the Union, Scott communicated the futility of joining the Union and the risks associated with the Union, including loss of benefits and having the organizing effort tied up for years in litigation.

e. The analysis

Complaint paragraph 5(r) alleges that since September 2011, Respondent by LRI consultant William Scott at the Gallup facility (1) solicited grievances from employees and promised increased benefits if they refrained from supporting the Union; and (2) interrogated employees about their union activities by soliciting employee signatures on an antiunion petition.

Respondent contends that this allegation should be dismissed because the General Counsel offered no evidence in support of the allegations in this paragraph. The evidence reflects that William Scott was never present at the Gallup terminal and, therefore, could not have committed the violations alleged in this paragraph. It appears that the allegations in complaint paragraph 5(r) are included in complaint paragraphs 5(x) and (cc). Since there is no evidence to support the allegations that Scott committed unfair labor practices in Gallup and since the same allegations will be considered in paragraphs 5(x) and (cc), I will recommend that the allegations in paragraph 5(r) be dismissed.

Complaint paragraph 5(x) alleges that from October 10 through 19, 2011, Respondent through William Scott in Albuquerque

> (1) threatened employees with discharge, (2) threatened employees with loss of medial and other benefits, (3) threatened employees with lengthy litigation if they selected the Union as bargaining representative and (4) informed employees it would be futile to select the Union as bargaining representative.

According to driver Ted Schneider, Scott told employees that they could possibly lose their 401(k) and medical benefits if they unionized, and that if they got a contract it could be tied up for years in litigation. Scott also told employees that they could be fired for any reason.

Scott's statement that employees could lose their benefits if they unionized violated Section 8(a)(1) of the Act. *M. O'Neil Co.,* 184 NLRB 629, 633–634 (1970).

By telling the employees that if they got a contract it could be tied up for years in litigation, Scott again violated Section 8(a)(1) of the Act by implying their efforts to unionize was futile. *Jet Spray Corp.*, 271 NLRB 127, 141 (1984); *L. F. Strassheim, Co.*, 173 NLRB 846, 846 (1968). By saying that employees they can be fired for any reason, in the context of discussing unionization, Scotty threatened employees with discharge in violation of Section 8(a)(1). *Regency Manor Nursing Home,* 275 NLRB 1261, 1271 (1985).

Complaint paragraph 5(cc) alleges that on about October 26, 2011, Respondent by William Scott in Albuquerque (1) solicited employee grievances and promised increased benefits if employees withdrew their support from the Union; (2) interrogated employees about their union activities; and (2) promised employees it would fix whatever was wrong to dissuade them from supporting the Union.

In his testimony, Scott admitted telling employees that, if the Union petitioned for an election, their wages and benefits would be frozen until the election process was over. This statement coerces employees in the exercise of their Section 7 rights, and violates the Act. In *DHL Express, Inc.*, 355 NLRB 1399, 1399 (2010), the Board found a violation where the employer, in a memo to employees, said that, if they selected the union as their bargaining representative, "all of your wages and benefits would be frozen pending the outcome of negotiations." Scott's statement here suggests that any annual increases or bonuses that employees may have earned would cease and is a violation of Section 8(a)(1) of the Act. *W. E. Carlson Corp.*, 346 NLRB 431, 443 (2006).

By asking drivers what they wanted, why they were upset, and saying he could "fix their problems," Scott also solicited grievances, promised employees increased benefits, and interrogated employees in violation of Section 8(a)(1) of the Act. See *Belcher Towing Co.*, 238 NLRB 446, 459 (1978); *Laboratory Corp. of America Holdings*, 333 NLRB 284, 284 (2001). When Scott asked Gonzalez what his issues were with Respondent, that they didn't need a union, and that he was there to resolve the issues within the Company, Scott improperly solicited employee grievances and promised to remedy them in violation of Section 8(a)(1) of the Act. *Laboratory Corp. of America Holdings*, supra.

Scott told Gonzales that he was making out a form for everybody to sign stating they don't want the Union, and they would resolve the problems from within. Goode admitted that the LRI consultants told employees to set up drivers committees and secure signatures on antiunion petitions. Respondent's drivers solicited signatures on these antiunion petitions with the knowledge of Respondent's managers as reflected in Proctor's email[78] of October 31, 2011, and the email.[79] Proctor received from LRI consultant Evelyn Fragoso on October 20, 2011. Goode admitted Respondent was using the LRI consultants as liaisons between management and those who were collecting the signatures.

I find that when Scott told Gonzales he was fixing a form for drivers to sign stating that they did not want the Union here, it was an attempt to elicit Gonzalez' union sentiments, inquire into whether he would sign the antiunion petition, and constituted an unlawful interrogation in

[78] GC Exh. 49.
[79] GC Exh. 47.

violation of Section 8(a)(1) of the Act. *Hasa Chemical, Inc.*, 235 NLRB 903, 906 (1978); *Eddyleon Chocolate Co.*, 301 NLRB 887, 898 (1991). Further, Scott, acting as an agent of Respondent, unlawfully attempted to solicit Gonzalez' signature on the antiunion petition, and was coercive in violation of Section 8(a)(1) of the Act. *Massillon Newspaper, Inc*., 319 NLRB 349, 360 (1995); *Bolivar Tee's Mfg. Co.,* 334 NLRB 1145, 1152 (2001).

f. The October 7, 2011 threats by LRI consultant Evelyn Fragoso that bargaining would start from scratch, that wages would be lower, and that it was futile to select the Union

In October 2011, Bloomfield driver Obie Frazier attended a mandatory meeting in the conference room of the Bloomfield facility with other drivers and LRI consultant Evelyn Fragoso. According to Frazier's initial testimony, Fragoso told the drivers that if they went union they would be bargaining from scratch. On cross-examination, Frazier said Fragoso said that in bargaining the drivers could end up with less or the same. Fragoso said that the part of her presentation about collective bargaining took about 5 minutes, and included an explanation that "when it comes to negotiations and during negotiations, you can get more, stay the same or you can get less. But all this stuff is negotiated."[80] She specifically denied ever saying that bargaining would start from scratch. Based upon Frazier's belated admission that Fragoso told him that in bargaining employees could get less or the same, it seems unlikely that an experienced labor consultant would have said only that employees could get less or the same, without adding "more," in bargaining. I credit Fragosos' testimony that she said you can get more, stay the same, or you can get less.

g. The analysis

Complaint paragraph 5(w) alleges that on about October 7, 2011, Respondent through LRI consultant Evelyn Fragoso at the Bloomfield facility (1) threatened employees by telling them that bargaining would start from scratch; (2) threatened employees with lower wages if they selected the Union as bargaining representative; and (3) told employees that it would be futile to select the Union as bargaining representative.

I find there is insufficient evidence that Fragoso told employees that they would have to bargain from scratch if they selected the Union as bargaining representative. The predicate for the allegations in complaint paragraph 5(w) is missing and I will recommend this allegation be dismissed.

h. The October promise of benefits by LRI consultant Simon Jara

Jara was introduced to Albuquerque driver Ever Rodriguez at the Gallup refinery as "Western management" by Respondent's human resources manager, Pamela Scott. Jara also identified himself as "company management." In October 2011, Rodriguez overheard conversations between Jara and drivers in the drivers' lounge in Gallup, in which Jara told drivers about a "Simon package." Jara said if the drivers stayed away from the Union he had something better to offer them. In an October 2011 memo to Proctor, Jara summarized that he told new employees that "if they voted the Union in, they will be governed under the union's

[80] Tr. 2082–2083.

restrictive rules of seniority, which places them at the bottom of the preferential list."[81] In an October 20, 2011 email[82] to Pamela Scott, Jara informed her that the sink in the drivers' room in Gallup had no running water, had been broken for a year, and that it would "make the guys happy" if it was fixed. After receiving the email, Respondent fixed the sink.

Jara denied that he ever introduced himself as "Western management," or ever used the expression "Simon package," or heard anyone else use it. He likewise denied that he ever told anyone that he had something better for them if they stayed away from the Union.

At the hearing, I found Jara to be a witness who would conform his testimony to whatever would please his customer and gave testimony that conflicted with what he had said in emails. In this regard, at the hearing Jara denied telling new employees that, if they voted the Union in, they will be governed under the Union's restrictive rules of seniority which places them at the bottom of the preferential list. However, the above memo he sent to Proctor on October 20, 2011, belies his testimony. In addition, in testimony Jara denied conducting any formal one-on-one meetings with drivers but the same memo to Proctor admits such one-on-one meetings were conducted. Jara testified that he did not pass out any literature to drivers, and denied passing out any union guarantee coupons. However, in an email he stated that he "passed out those union guarantee coupons and a couple of guys went to the organizers and asked them to sign them."[83] Given the inconsistencies in Jara's testimony and my observation of his demeanor, I credit Rodriguez' testimony over that of Jara.

i. In complaint paragraph 5(bb) it is alleged that in October 2011, Respondent through Jara promised employees a better package if they withdrew their support from the Union

In its brief, the General Counsel argues that while Jara's threat to stay away from the Union and the threats that new employees would be subjected to new seniority rules, are not alleged in the complaint, these violations should be found, as they were fully litigated, and closely relate to the subject matter of the complaint allegations. These unpled allegations are closely related to other complaint allegations involving the LRI consultants' alleged threats, promises of benefits, solicitation of grievances, threats of lower wages, and threats of bargaining from scratch. See complaint allegations 5(w), (x), (bb), and (cc). In fact, Jara denied that he ever told anyone that he had something better for them if they stayed away from the Union. Moreover, there was no objection to the introduction by the General Counsel in its case in chief of Jara's memo to Respondent in which he stated he had told employees, "[I]f they voted the Union in, they will be governed under the union's restrictive rules of seniority, which places them at the bottom of the preferential list."[84] Likewise, there was no objection to Jara's October 20, 2011 email[85] to Pamela Scott, informing her that the sink in the drivers' room in Gallup had no running water, had been broken for a year, and that it would "make the guys happy" if it was fixed.

[81] GC Exh. 70.
[82] GC Exh. 113.
[83] GC Exh. 117.
[84] GC Exh. 70.
[85] GC Exh. 113.

The Board has found that, where the respondent's witnesses testify to the facts giving rise to the unalleged violation, no party has objected to the testimony, and the respondent has had an opportunity to further explore the issue during the hearing, the "fully litigated" requirement is met. *Pergament United Sales*, 296 NLRB 333, 334–335 (1989). I find that this is the case here and will consider the unpled allegations.

By telling drivers that if they stayed away from the Union Jara had something better to offer them, while couched as a promise of benefits is also a threat because implied in Jara's statement is a threat that those who supported the Union would not receive the promised benefits. I find no merit in Respondent's assertion that Jara made no promise of benefits since Rodriguez did not know what, if any benefits, Jara was referring to. It was clear from Rodriguez' testimony that Jara was offering something of benefit to the drivers as a reward for staying away from the Union. That Rodriguez could not identify specifically what that benefit was is immaterial. Jara's statement violated Section 8(a)(1) of the Act. *Vegas Village Shopping Corp.*, 229 NLRB 279, 280 (1977).

Jara's statement to new drivers that if they voted the Union in they would be governed under restrictive rules of seniority that places them at the bottom of the preferential list, is a simple threat that if the Union came in, drivers could lose extant seniority benefits with Respondent and violated Section 8(a)(1) of the Act. *Evergreen America Corp.*, 348 NLRB 178, 206 (2006); *Stop N' Go Inc.*, 279 NLRB 344, 348–349 (1986).

Finally, in the midst of an organizing drive Respondent fixing the sink in the Gallup breakroom, which had been broken for over a year could be perceived by employees as a benefit to discourage their support for the Union. *Milum Textile Services Co.*, 357 NLRB No. 169, slip op. at 1 fn. 3, 24 (2011); *Hasa Chemical, Inc.*, 235 NLRB 903, 907 (1978). Respondent violated Section 8(a)(1) when it granted this benefit to employees.

11. The October 6, 2011 interrogation and threats by Albuquerque Terminal Manager Eric Burnham

a. The facts

In early October 2011, Albuquerque driver Dean Perry had a conversation with his supervisor, Eric Burnham, in Burnham's pickup truck while Burnham was taking Perry to get his truck that was being serviced. Burnham said, "Well, I sure hope I don't lose my job over this union thing."[86] When Perry replied that the Union was not after anyone's job, Burnham said, "Well you don't understand, Western could shut this whole thing down, they could walk away from the leases on the tractors, sell the trailers, sell all of the lube equipment, they're all paid for, that's nothing but profit."[87] Burnham did not testify.

[86] Tr. 1502, LL. 21–22.
[87] Ibid at 1502–1503, LL. 23-25, 1–2.

b. The analysis

Complaint paragraph 5(u) alleges that on about October 6, 2011, Respondent through Supervisor Eric Burnham in his vehicle (1) interrogated employees about their union activities; (2) threatened employees with discharge; and (3) plant closure if they selected the Union as their bargaining representative.

Albuquerque Terminal Manager Burnham was Perry's supervisor. Respondent argues that Burnham's declaration was merely a statement of his personal opinion, not that of Respondent, and was not a threat to discharge Perry, citing *Standard Products Co.,* 281 NLRB 141, 151 (1986). The facts of this case are distinguishable from *Standard Products Co.* In that case, the supervisor specifically told the employee that it was her opinion that the plant would close. Here, Burnham's statement was made as Perry's supervisor and is binding on Respondent. Further, his statement was supported by facts that would reasonably lead to the conclusion that Respondent was prepared to close its operations if the Union came in. Moreover, if Respondent closed the terminal where Perry worked, a reasonable inference can be drawn that Perry would be terminated. Accordingly, Burnham's statement to Perry is clearly an illegal threat of plant closure and discharge of Perry, and a violation of Section 8(a)(1). *BLT Enterprises of Sacramento, Inc.*, 345 NLRB 564, 577 (2005).

Because Burnham's statement about plant closure was an affirmative statement not a question, Respondent asserts it cannot be interrogation. I reject this contention. An affirmative statement designed to elicit information about an employees' union activity can be considered interrogation. Certainly, a statement that Respondent would close its terminal if the Union came in could be expected to draw a response from and did draw a response from Perry about the Union. Accordingly, Burnham's statement also constitutes an unlawful interrogation in violation of Section 8(a)(1) of the Act. *Belcher Towing Co.,* 238 NLRB 446, 459 (1978).

12. The October 2011 threats of loss of benefits by Proctor

a. The facts

Albuquerque driver Ray Dazhan attended a drivers' safety meeting with LRI consultant William Scott, Western Refining Wholesale, Inc.'s general manager of distribution/transportation, Procter, and Western Refining Wholesale, Inc.'s distribution and operations manager, Curtwright. Scott asked drivers why they were upset with Respondent and what was wrong with the Company. He said he had the power to fix what was wrong if the drivers were just to tell him. Dazhan started asking Scott questions and the discussion became heated. When Dazhan asked Scott why Respondent was giving new drivers the same amount of bonus as more experienced drivers, Chris Proctor asked if Respondent should just take the bonuses away from them. On cross-examination, Dazhan testified that Proctor asked the question, "Well, you want us to take it back?"[88] Driver Ted Schneider likewise testified that Proctor said, "You want us to take it back?"[89] Proctor was not called as a witness. It seems likely that Proctor framed his statement as a question.

[88] Tr. 1754.
[89] Ibid at 695.

b. The analysis

Complaint paragraph 5(y) alleges that in October 2011, Respondent through Proctor at the Albuquerque facility threatened employees with loss of benefits if they engaged in union activity.

Driver Dazhan's questions about why Respondent was paying inexperienced drivers the same bonus as drivers with more seniority was met with Senior Manager Chris Proctor's response, "You want us to take it back?" While Respondent argues that Proctor's statement falls short of being the type of statement prohibited by Section 8(a)(l) and was not to be taken seriously because by October 2011 when the statement was allegedly made, the bonus being discussed had already been paid, I reject this contention. Proctor was a senior manager and a driver would necessarily take his statement seriously. Moreover, while the bonus may have been paid, there was nothing to prevent Respondent from discontinuing the bonuses. Accordingly, I find Proctor's statement was an illegal threat in violation of Section 8(a)(1). *Northwest Graphics, Inc.*, 342 NLRB 1288, 1291, 1296 (2004).

13. The October 20, 2011 threats, surveillance, maintenance, and enforcement of a no-solicitation rule

a. The facts

On October 20, 2011, Pamela Scott had a telephone conversation with Respondent's El Paso driver Roberto Aguirre. During this call, Scott told Aguirre that it was brought to her attention that he continued to harass drivers about the Union, and that Respondent would not tolerate that. Aguirre said that this was not true, but Scott continued, accusing Aguirre of getting "out of hand," scaring Gailey, and cursing in front of an office worker. During this call, Scott admitted she told Aguirre that "you cannot talk about union on company property while you're on company time."[90] As she summarized in an October 21 email,[91] Scott told Aguirre that the next time she spoke with him "it will not be as pleasant of a conversation." Scott testified she had been informed by Gailey that drivers had complained to him that Aguirre was at the loading rack trying to solicit for the Union while they were working. Gailey's information was summarized in an October 7, 2011 email[92] stating that drivers complained that Holguin said Aguirre wanted to talk to them about the Union. Scott admitted she informed Aguirre in the phone conversation that "[t]his is a friendly reminder, Roberto. You cannot solicit for the union while the drivers are out on company time on the rack. It's safety sensitive."[93] Aguirre replied, according to Scott, "Do I need an attorney?" to which she said, "No, Roberto, this is a friendly reminder and also you're language needs to be in check at the terminal."[94] When asked if Scott said anything about the Union, he testified that "[s]he said that we couldn't be talking about it at the work place, that it was against the law."[95]

[90] Ibid at 2449.
[91] GC Exh. 109.
[92] GC Exh. 66.
[93] Ibid.
[94] Ibid.
[95] Ibid. at 1223.

On cross-examination, in response to the leading question, "Did she tell you you're not supposed to do whatever it is that you were talking about during working time?" Aguirre said, "Yes."[96] The words working time are counsel's not Aguirre's. The only information Respondent had about Aguirre was that two drivers complained about him wanting to talk about the Union. In view of Scott's past use of the term company time and equating talking with soliciting, I credit Aguirre's version of this conversation that Scott told him he could not solicit drivers on company time while on company property.

b. The analysis

Complaint paragraph 5(z) alleges that on about October 20, 2011, Respondent through Pamela Scott in a phone call (1) created an impression that employees' union activities were under surveillance; (2) promulgated an overly broad, discriminatory rule prohibiting employees from harassing coworkers; (3) enforced the harassment rule; (4) threatened employees with reprisals by telling them it was unlawful to discuss the Union on Respondent's property; and (5) threatened employees with reprisals for engaging in union activity.

Prohibiting solicitation on "company time" is an unreasonably broad and illegal rule. *Gemco*, 271 NLRB 1190, 1190 (1984). Precluding union discussions on company time and on company property, is likewise overly broad and illegal. *RCN Corp.*, 333 NLRB 295, 301 (2001); *Marlene Industries Corp.*, 166 NLRB 703 (1967); *Wipo, Inc.*, 199 NLRB 649, 649 (1972). Accordingly, Scott's statement to Aguirre that he was precluded from talking about the Union while he was on company property and company time violated Section 8(a)(1).

Scott also created an impression of surveillance when she told Aguirre that it had been brought to her attention that he had continued to harass drivers about the Union and that he could not talk about the Union. Respondent contends that there can be no impression of surveillance since Scott disclosed it was drivers who were complaining about Aguirre's solicitation. However, it is undisputed that both Gailey and Scott, in reading Gailey's email[97] to Aguirre in which Gailey reported he refused to divulge the identity of the complaining drivers to Aguirre, refused to divulge the source of the information about Aguirre's union activity, thus creating in Aguirre's mind the impression that Respondent was surveilling his union activities in violation of Section 8(a)(1) of the Act. *Flexsteel Industries*, 311 NLRB 257 (1993). Scott's remark that the next time they had to talk "it will not be as pleasant of a conversation," was a threat, as it served as an intimidating force directed at Aguirre's union activity. (GC Exh. 109.) *Mid-South Mfg. Co.,* 120 NLRB 230, 248 (1958).

Respondent claims the allegation that Scott equated Aguirre's union solicitation with harassment and thus repromulgated and maintained an overly broad and discriminatory rule prohibiting employees from harassing coworkers defies understanding. Respondent argues that there is no evidence that Scott equated harassment with union solicitation and/or promulgated and enforced a rule regarding the same. Respondent contends that the Western Refining's employee handbook[98] contains a valid prohibition against harassment. When employees report that they have been harassed, Respondent investigates the issue and takes what it believes is

[96] Ibid. at 1993–1994.
[97] GC Exh. 77.
[98] GC Exh. 6, p. 32.

appropriate remedial action. Respondent's harassment and discrimination policy states under Purpose:

> The Company maintains a strict policy prohibiting not only sexual harassment but also harassment or discrimination on the basis of race, color, national origin, sex, religion, age, physical or mental disability, or any other basis prohibited by federal, state or local law.

By its own terms this policy does not apply to union activity. Any attempt to stretch the application of a traditional no harassment policy based on sex, race, religion, age, or disability to the reports of harassment by drivers concerning union advocates is sophistry. The record is replete with evidence in the form of driver testimony, Respondent's own memos and emails of Respondent's equation of union talking and solicitation with harassment. The so called investigation of such complaints of harassment by Respondent failed in any case to establish any harassment of or threats to drivers. Respondent's own investigation reflects that union supporters were doing no more than talking to other drivers about the Union. While the "harassed" drivers may have found that persist advocacy by union supporters unwanted, there was no evidence that the union advocates did more than exercise their rights under Section 7 of the Act.

Respondent turns it policy on solicitation and distribution on its head and claims that somehow it protects employees from the "harassment" of being solicited to sign a card for the union while they are working. Respondent has conjured up evidence that does not exist. The so called harassment that was reported never established that prounion drivers did more than solicit or talked to coworkers about the Union. Nor did Respondent establish where or when the alleged talking or soliciting took place. Moreover, the evidence also shows that there was disparate enforcement of its solicitation and distribution policy as Respondent permitted drivers to solicit antiunion petitions and allowed the LRI consultants to solicit drivers about the Union at work.

The Board has held that an employer's application of a, "harassment policy" during a union campaign "has the potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities." *W. F. Hall Co.*, 250 NLRB 803, 804 (1980), quoting *Colony Printing & Labeling, Inc.*, 249 NLRB 223, 225 (1980), enfd. 651 F.2d 502 (7th Cir.1981). Moreover, an employer may not invoke a harassment policy because other employees do not like union advocacy. As the Board explained in *Ryder Truck Rental*, 341 NLRB 761, 761 (2004), "the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited."

Here, Scott repromulgated Respondent's written prohibition on harassment contained in Goode's October 2011 memo to drivers in violation of Section 8(a)(1) of the Act. Scott equated harassment with Aguirre's union solicitation, then enforced this policy against him without any substance of evidence from Trillo that Aguirre had done anything more than talk with him about the Union. Respondent's contention that it appears that Scott's statement that the next time she spoke with him "it will not be as pleasant of a conversation," was directed to the "profanity and the abusive language that Aguirre was using is unfounded. Clearly Scott was talking to Aguirre

primarily about his harassment of coworkers. By enforcing this policy and by threatening Aguirre Scott was threatening Aguirre with more serious discipline if he continued to engage in union activities in violation of Section 8(a)(1) of the Act.

14. The October 21, 2011 promulgation and enforcement of a no access rule, enforcement of the no-solicitation rule and promulgation and enforcement of a no-distribution rule by David Townsend the Gallup terminal manager

a. The facts

In October 2011, Albuquerque drivers Ever Rodriguez and Ray Dazhan went to the Gallup refinery while off duty to advocate support for the Union. They went into the Gallup drivers' room and began putting fliers on tables, handing out union buttons and lanyards, and talking to the drivers. As they were handing out the union information, they were approached by Gallup Terminal Manager David Townsend. Townsend said that they could not be handing out union literature and they had to leave. Rodriguez told Townsend that it was his right to be there, but Townsend restated that they had to leave and they could not pass out union materials. According to Rodriguez, there was antiunion material on the tables. Rodriguez said he tried to post some of the union material on the bulletin board, but Townsend told him he could not do so. According to Rodriguez, in addition to antiunion literature, the bulletin board contained a flier for a Harley Davidson motorcycle raffle that a driver had posted. Before the Union began organizing in 2011, employees posted nonwork related items on the bulletin board, the tables, and walls of the drivers' lounge. The evidence also shows that employees sold Girl Scout cookies, candy bars, raffle tickets, and solicited for football pools. Moreover, drivers were allowed to solicit signatures on their antiunion petitions from coworkers in the drivers' lounge. LRI consultants were allowed free range of the driver's lounges and passed out antiunion literature. Jara handed out union guarantee coupons.

It does not appear that there was a bulletin board in the Gallup drivers' room in October 2011. According to Rick Mecale, who has supervisory responsibility for the building, the bulletin board in the drivers' lounge portion of the building was removed in February or March of 2011. Tr. 2920–2922. Driver Kevin Taddy confirmed that the bulletin board in the drivers' room was removed when the union organizing began. The only bulletin boards in place in October 2011 when this incident occurred were in what was called the computer room and no postings at all were allowed by Mecale on those boards, other than work-related materials that he posted.

b. The analysis

Complaint paragraph 5(aa) alleges that on about October 21, 2011, Respondent through its Supervisor David Townsend at the Gallup facility (1) promulgated and maintained an overly broad, discriminatory rule prohibiting off-duty employees from being in the drivers' lounge, (2) disparately enforced this rule because of employees union activity, (3) disparately enforced Respondent's solicitation and distribution rule set forth in complaint paragraph 5(d), and (4) promulgated an overly broad, discriminatory rule restricting employees from posting literature on Respondent's walls in nonwork areas.

Townsend prohibited off-duty employees in the drivers' lounge from soliciting and distributing on behalf of the Union. Respondent cannot contend that the drivers' room was a work area. The occurrence of nonproduction work activity on part of an employer's property does not, by itself, allow an employer to declare its entire property to be a "working area" for the purpose of excluding employee solicitation activity. Here, the main function of the Respondent's Gallup facility is to load fuel. Any work activity which may have occurred in the drivers' lounge is incidental to this main function. To hold that this is a work area would, as recognized in *U. S. Steel Corp*., 223 NLRB 1246, 1247–1248 (1976), "effectively destroy the right of employees to distribute literature." *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000).

Respondent's argument that Rodriguez and Dazhan had no right to enter the drivers' room also fails as I have found it is not a work area. Whether posted on a bulletin board or on the drivers' room walls, Respondent had previously permitted a multitude of postings in the driver's room. Moreover, Respondent's argument that it need not permit use of its own bulletin boards is misplaced. The issue herein is not the use of bulletin boards but access to distribute union materials during non-work time in non-work areas.

Respondent's argument that Townsend had no authority to promulgate a rule is without foundation. Townsend was the terminal manager in Gallup and had supervisory authority over drivers stationed there. Clearly, he had the ability to convey to his subordinates that he had the authority to tell them they could not be present in the drivers' room and could not post or distribute literature.

Accordingly by prohibiting Rodriguez and Dazhan from entering the drivers' room to distribute union materials, Respondent violated Section 8(a)(1) of the Act. *Fairfax Hospital,* 310 NLRB 299, 301, 305, 313 (1993).

Townsend's prohibition was both an illegal promulgation of a new rule prohibiting off-duty employees from being in the drivers' lounge and enforcement of Respondent's overly broad access rule contained in its solicitation and distribution policy[99] found unlawful above. *Tri-County Medical Center,* 222 NLRB 1089, 1089 (1976).

As to the rule restricting employees from posting literature on Respondent's walls, Respondent contends the employees had no right to post literature on the walls of the drivers' room. The record reflects that when Rodriguez and Dazhan tried to post union materials on Respondent's walls, there was no longer a public bulletin board for drivers to use. The only bulletin board was in the computer room and its use was limited to Respondent's materials. Clearly, Respondent is under no obligation to allow use of its bulletin boards for employee use, so long as there is no evidence of disparate enforcement. There is no evidence that Respondent allowed the use of its bulletin boards for any nonwork purpose. However, I find complaint allegation 5(aa)(4) broad enough to encompass a rule prohibiting distribution of union literature. By prohibiting the distribution of union literature and materials in a nonwork area, during nonworktime, Townsend promulgated an overly broad no-distribution rule in violation of Section 8(a)(1) of the Act. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962), *Ford Motor Co.,* 315 NLRB 609, 610 (1994).

[99] GC Exh. 7, p. 4.

Finally, by escorting the two employees off the property, Respondent was enforcing its no loitering rule contained in item 3 of the rule in complaint paragraph 5(d), and further violated Section 8(a)(1). *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000).

15. The November 14, 2011 threats to employees by Bloomfield Transportation Supervisor Rusty Royce

a. The facts

On November 14, 2011, Bloomfield driver Obie Frazier went to Transportation Supervisor Rusty Royce's office where Royce asked Frazier to sign a disciplinary form[100] and said that Frazier was being written up for copying union materials. The warning stated:

> **Details**: On October 24th at approximately 5:30 a.m. Obie was observed by security making copies on a company copier. When he was done the security officer looked in the printer + found a union meeting notification that was left behind by Obie.
>
> **Why this is a problem for the company or department:** This is an unauthorized use of company equipment for personal use.
>
> **Specific changes in performance or behavior which must occur, including date for compliance:** Obie must not use any company property for personal use. If there is any further incidents of this nature, by useing (sic) company property for personal use or doing personal business on company time, this will be grounds for immediate termination.
> **This will effect 4th quarter bonus.**

b. The analysis

Complaint paragraph 5(dd) alleges that on about November 14, 2011, Respondent by Supervisor Rusty Royce and Redfearn at its Bloomfield facility threatened its employees with loss of a quarterly bonus because they violated Respondent's solicitation policy set forth in complaint paragraph 5(d).

While not alleged in this complaint paragraph, the General Counsel contends that additional allegations should be entertained including that Frazier was threatened with discharge, an impression of surveillance of union activities was created and by issuing the discipline Respondent enforced its no-solicitation and distribution policy. The General Counsel contends that while the complaint does not allege these additional allegations, they are closely related to the allegation in this paragraph and were fully litigated by the parties. *Redd-I, Inc*., 290 NLRB 1115 (1988).

The allegation of a threat of discharge is certainly closely related to the events surrounding this allegation since the disciplinary form, received into the record states that further incidents could lead to termination.

[100] GC Exh. 106.

The issue of Frazier's violation of Respondent's solicitation and distribution policy was raised in this complaint paragraph as well as his previous discipline for violating this policy, thus enforcement of that policy is closely related.

The issue of surveillance was raised during the litigation of this allegation as it relates to the allegation in complaint paragraph 7(g) that the warning violated Section 8(a)(3) of the Act. The matter was fully litigated during the hearing and evidence was taken concerning the actions of the security guard in observing Frazier's use of the copy machine.

I find that the additional allegations are closely related to extant allegations of the complaint and will be considered.

As to the allegation of surveillance, the General Counsel contends that Frazier's disciplinary form of November 14, 2011, contains language that could be construed that Respondent was engaging in surveillance of Frazier's union activities. Because the form says Frazier was seen by security using the copy machine and later the security guard found a union meeting notification that was left behind by Obie, the General Counsel concludes that this language could be construed as a sign that Respondent was peering over Frazier's shoulder, and constitutes an impression of surveillance. I disagree. Whatever the security guard found was in plain view on the copy machine. The form discloses how the form was discovered and by whom. This cannot possibly leave Frazier with the impression his union activities were being spied upon. I will recommend this allegation be dismissed.

The General Counsel next contends that in disciplining Frazier for making union materials it affirmed and enforced its overly broad no-solicitation policy. From the language of his warning, it is clear Respondent was disciplining Frazier for his unauthorized use of Respondent's equipment in violation of a rule in its employee handbook[101] prohibiting misuse of company property rather than a violation of Respondent's solicitation policy.[102] The misuse of company property rule states:

> POLICY:
>
> Employees are expected at all times to conduct themselves in a positive manner so as to promote the best interest of the Company. The following conduct is prohibited and may subject the employee involved to disciplinary action, up to an[d] including termination. The list of examples below is illustrative of the type of behavior that is not permitted, but is not intended to be all inclusive:
>
> * * *
>
> 3) Theft, destruction, defacement or misuse of Company property, funds, records, equipment, proprietary information or personal property of employees or customers.

[101] GC Exh. 6, pp. 68–69.

[102] While General Counsel alleges it was Respondent's solicitation policy that was violated, I find that the misuse of company property rule is closely related to the allegation in the complaint. Moreover, the issue was fully litigated as Frazier's warning clearly refers to the misuse of company property rule and Respondent was on notice that a rule violation was in issue in the pleadings.

While drivers use the copy machines in Respondent's offices for personal use, the record reflects that there is no requirement that an employee asks for permission to access the copy machine. Both Milton and Redfearn admit that they have seen employees use the copy machine regularly but neither Milton nor Redfearn have monitored what the drivers are copying. The security guard had never reported that other drivers use the copy machine for personal use. Both Milton and Curtwright admitted the employees are allowed to use Respondent's property, including IT equipment and the telephone for personal purposes. Milton browses internet websites to check stock reports at least twice a week. He has never been disciplined for viewing the stock reports while using the work computer.

It appears that in issuing this warning to Frazier disparately enforced the above rule by allowing the use of its copy machine and other company devices for a host of personal uses but not for the purpose of making copies of union related material in violation of Section 8(a)(1) of the Act. *Fremont-Rideout Health Group,* 357 NLRB No. 158, slip op. at 2 (2011).

Having found that the predicate for Frazier's discipline is disparate application of the misuse of company property rule, it follows that he discipline and the threat of loss of his bonus and the threat of discharge contained in the warning also violate Section 8(a)(1) of the Act.

Complaint allegation 5(ee) was withdrawn by General Counsel.

16. In December 2011 and January 30, 2012 safety manager Tony Smith solicits drivers' grievances and promises increased benefits

a. The facts

In late 2011, Respondent implemented a new driver safety program. The new safety program had an increased bonus, called the Zero Club. Kevin Goode admitted that the new drivers' safety program was a response to drivers' complaints about the inconsistent application of Respondent's rules regarding bonuses and the effects of a violation affecting their bonus.

Under the Zero Club drivers received an extra $625 if they completed 36 months without any safety-related points. It went into effect in January 2012. Before the Zero Club was implemented, Respondent held meetings with the drivers and asked them questions about the program. Drivers gave their concerns to Respondent and changes were made to the safety program.

Safety Manager Tony Smith admitted that he met with drivers with respect to the new safety program for the purpose of getting driver input. He reviewed the drivers' comments with Chris Proctor, and the drivers' comments resulted in changes to the new safety program. There is no evidence that Respondent had previously reviewed a program with its employees and asked for their input while incorporating employees' suggestions into the program. While Smith claims Respondent reviewed loading and unloading regulations with its employees, those were not new disciplinary or compensation programs, but appear to be government regulations. Moreover, there is no evidence that other than reviewing the regulations with drivers that Respondent ever solicited their input. Given that they were government regulations, there would

be little point in getting input from the drivers since the drivers' comments would have no impact on the regulations.

The new safety program was implemented in January 2012.

b. The analysis

Complaint paragraph 5(ff) alleges that between December 2011 and January 2012 Respondent through safety manager Tony Smith solicited grievances and promised benefits if employees refrained from supporting the Union.

The solicitation of grievances during an organizing campaign accompanied by a promise to remedy those grievances, whether express or implied, violates the Act, unless there has been a previous practice of soliciting employee grievances. *Maple Grove Health Care Center,* 330 NLRB 775, 775 (2000). Contrary to Respondent's assertion, there is no evidence Respondent had a previous practice of meeting with employees and obtaining their input into a benefit program or soliciting employees' grievances in any fashion. The record is clear that Smith solicited and noted drivers' comments about the safety program and those comments resulted in Respondent subsequently changing the program. Respondent contends that Smith's conduct is not the type of solicitation prohibited by the Act. Respondent relies on *American Red Cross Missouri-Illinois,* 347 NLRB 347, 351 (2006) in support of this proposition. However, *American Red Cross* is inapposite since the Board found therein that the respondent had an established practice of soliciting its employees' grievances. Specifically, for several years preceding the Union's organizing drive, the Respondent solicited its employees' grievances in regular meetings, during informal conversations, and with two surveys. There is no such practice established here.

Respondent contends that there is nothing about Smith's review of the draft safety plan with drivers to get their input that contains a suggestion, much less a "promise," that he is going to correct the drivers' grievances. However, it is well established that absent a previous practice of doing so, it is the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances that violates the Act. It is the promise, expressed or implied, to remedy the grievances, that constitutes the essence of the violation. The solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Further, the fact an employer does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions the employees expect. The inference that an employer is going to remedy the same when it solicits grievances in a pre-election setting is a rebuttable one. *Maple Grove Health Care Center,* 330 NLRB 775, 775 (2000). Respondent has done nothing to rebut the presumption that it would remedy the drivers input rather it incorporated their suggestions affirming it would remedy their complaints about the safety program.

Accordingly, Respondent violated Section 8(a)(1) by soliciting grievances (???) it drivers about the driver safety program. *Maple Grove Health Care Center,* 330 NLRB 775, 775 (2000). *Chartwells Compass Group, USA, Inc.,* 342 NLRB 1155, 1168 (2004).

17. On January 30, 2012, HR Generalist Cathyrne Valdez solicits employee grievances and promised increased benefits

a. The facts

After the safety program was implemented, Respondent met with each driver to review the program. Human Resources Generalist Cathryn Valdez participated in these meetings. She had a form[103] that contained a list of questions that were created by Pamela Scott. Scott told Valdez to review these questions with drivers, build a relationship with them, and to ask them if they need any help or anything. While this form had been used in the past in employee exit interviews, January 2012 was the first time this form was ever used with current drivers. Valdez read the questions to the drivers, and wrote down their answers. There is no evidence that Respondent had any past practice of asking current employees the type of questions set forth on the form. The form consists of six numbered questions and a final space for "Other issues or concerns." The six numbered questions are as follows:

1. My Supervisor/Company does a good job in keeping me informed.
2. Management establishes and follows high standards of performance and conduct.
3. My supervisor treats me with honesty, dignity and respect.
4. My accomplishments are appreciated, recognized and rewarded.
5. My concerns, ideas, and suggestions are acknowledged and valued.
6. I have been provided with the proper tools/equipment to do my job.

Other issues or concerns

Complaint paragraph 5(gg) alleges that in about January 30, 2012, Respondent through HR Generalist Cathryne Valdez at its Albuquerque facility solicited employee grievances and promised benefits if they refrained from supporting the Union.

b. The analysis

The use of this form and the questions asked of extant drivers must be considered in context. That context was an ongoing union organizing campaign. Respondent established a practice of promising benefits to its employees initially with the promise and granting of increased benefits, and later through use of LRI consultants who solicited grievances and promised benefits and finally in open-ended questionnaires that had nothing to do with the new driver safety program. Open-ended questions can result in anything being raised by employees about terms and conditions of employment. Asking about being provided with the proper tools and equipment to perform ones job is nothing less that soliciting employees about conditions of employment as is the question how supervisors treat employees. Respondent suggests the form only asks for yes or no answers so grievances cannot be solicited. However, these questions are open ended and could result in a driver giving a lengthy response. The last question allows for any input from drivers. I find that Respondent again solicited grievances with an implied promise to remedy them in violation of Section 8(a)(1) of the Act. *Maple Grove Health Care Center,* 330 NLRB 775, 775 (2000).

[103] GC Exh. 22.

18. In October 2011, Albuquerque Terminal Manager Eric Burnham (1) interrogated employees, (2) threatened employees with plant closure, and (3) threatened employees with discharge

a. The facts

Albuquerque driver Ever Rodriguez testified that around the end of October he was in the Albuquerque drivers' lounge alone with Burnham. According to Rodriguez, Burnham said because of what you guys are doing, the company is thinking of relocating the trucks back to Gallup. Rodriguez replied that "we have a right to campaign" to which Burnham did not respond.

Consistently, on cross-examination Rodriguez testified that Burnham said, "Because of what you guys are doing, the company's thinking about relocating the terminal, which will put, I don't know, you guys out of a job." He said Burnham then asked him "Why are you doing what you're doing"[104] to which Rodriguez said he did not reply.

b. The analysis

Complaint paragraph 5(hh) alleges that in October 2011, Respondent through Burnham at its Albuquerque facility interrogated its employees about their union activities, threatened employees with plant closure and discharge if they selected the Union as bargaining representative.

Respondent contends that there is no merit to this allegation since Burnham had no authority to make these statements and because Rodriguez was somehow trying to dupe Burnham into saying things Rodriguez could later claim to be violations of the Act. I reject both of these contentions. As a statutory supervisor who was in charge of the drivers at the Albuquerque terminal, Burnham had the authority to bind Respondent to his statements. There is nothing in his statements about plant closure and relocation that appears unreasonable. There is no basis in the record for the allegation that Rodriguez was trying to "dupe" Burnham into violating the Act. Burnham did that voluntarily. Burnham's threats of plant closure and relocation as well as his interrogation of Rodriguez violated Section 8(a)(1) of the Act.

19. The December 2011 Burnham threat of discharge

a. The facts

In December 2011,[105] Albuquerque drivers Ray Dazhan and Ever Rodriguez were in Burnham's office trying to get information from him about what the Respondent was doing in the organizing campaign. Burnham said that Respondent did not tell him anything. Dazhan said they were "messing around" with Burnham talking about the union and told Burnham to "come over to the light." During the course of this conversation, Dazhan said (???) Burnham said

[104] Tr. 426–427.

[105] While the complaint alleges this conversation to have occurred on November 4, 2011, the record reflects it took place in December 2011.

"we're all going to be in the unemployment line."[106] Dazhan said that they were joking around with Burnham during this conversation.

b. The analysis

Complaint paragraph 5(ii) alleges that on about November 4, 2011, Respondent through Burnham threatened employees with discharge if they continued their union activities.

Respondent contends that this allegation should be dismissed because since the participants were messing around there was nothing coercive about the statement. Respondent argues that Burnham's statement was an invited response and part of the "joking around" and a personal opinion of Burnham.

While the conversation between Burnham, Dazhan, and Rodriguez may have been relaxed, there is nothing relaxing about a statement that they could all be in the unemployment line, i.e., fired. It must be observed that Burnham's statement did not occur in a vacuum. It occurred in the context of an organizing campaign in which Burnham had in October separately told both drivers Rodriguez and Perry that Respondent could move the Albuquerque terminal to Gallup. I conclude that Burnham's statement to Dazhan and Rodriguez was a coercive threat of termination in violation of Section 8(a)(1) of the Act. *Standard Products Co.,* 281 NLRB 141 (1986).

20. The January 27, 2012 threats by Pamela Scott

a. The facts

On January 27, 2012, Bloomfield driver Obie Frazier was called into a meeting with Milton, Tony Smith, Pamela Scott and Cathryne Valdez. Smith began the meeting by reviewing the safety program with Frazier, and told him he had six points on his record under the new program. Scott told Frazier that Ruby Smith had told him he was supposed to be at the meeting that morning. Milton said he had sent Frazier a text message and left a voicemail for him. When Frazier denied that Smith told him to be at the morning meeting, Scott said Respondent would investigate and if Frazier was wrong, he would be brought up on charges of insubordination.

At hearing, Scott admitted that during the meeting she invited Frazier to quit. Scott asked Frazier "Do you enjoy working for Western?" When Frazier told her that he did not like working for Western, Scott said, "I would hate to have to come to work every day and hate my job. There's other jobs out there. If you don't like it here, you know, I can help you find another job out there. There's other jobs out there that maybe you could be happier at."[107]

Scott also admitted she said, "There's other union jobs out there. If you want to work for a union job, there's union shops out there."[108]

[106] Tr. 1721.
[107] Tr. 2457, LL. 9–14.
[108] Id. at LL. 19–21.

b. The analysis

Complaint paragraph 5(jj) alleges that on about January 27, 2012, Respondent through Pamela Scott in Bloomfield (1) threatened employees with charges of insubordination and (2) invited them to quit because of their union activities.

General Counsel argues that it was reasonable of Frazier to consider Scott's statement that Respondent would investigate his denial that he had notice of the safety meeting and, if untrue, charge him with insubordination to be a threat. General Counsel also contends that Scott's admission that she invited Frazier to quit was a threat.

Respondent takes the position that Scott did not invite Frazier to quit but simply talked to him in an effort to find out why he was being so difficult to get to a meeting. Respondent claims Scott did nothing more than let him know that she would assist him if he wanted to find another job where he would be happy.

As to the allegation that Scott threatened Frazier with charges of insubordination, I do not find this to have been an unlawful threat. Scott couched her language in terms of if an investigation disclosed Frazier had notice of the safety meeting and failed to attend, this would constitute insubordination. Since Scott's statement was conditional upon a finding that Frazier's action was insubordination, I conclude that there was no unlawful threat that a reasonable person would have concluded would chill Frazier's Section 7 rights. *Rossmore House,* supra.

However, Scott's statement that if Frazier did not like working for Respondent she could find him another job he was happier, a union job, was not a voluntary offer of assistance, particularly in the context of the organizing campaign and Respondent's antiunion efforts.

In *Fresh & Easy Neighborhood Market, Inc*., 356 NLRB No. 90, slip op. 4–5 (2011) the Board found a similar invitation to quit rather than continue to engage in union activity a violation of Section 8(a)(1) of the Act.

Here Scott, without qualification, invited Frazier to seek employment at a union company. The inference was that Respondent would be happy to have a known union advocate cease his union activity by departing. I find Scott's comment violated Section 8(a)(1) of the Act.

21. The November 2011 handbilling at the Giant gas stations and markets

a. The facts

Sometime in early November 2011, union organizers and Respondent's drivers began passing out leaflets[109] at Respondent's Giant gas station/convenience stores in the Albuquerque and Santa Fe areas to advise the public of their organizing drive among Respondent Western Refining Wholesale, Inc.'s drivers.

Union organizer Reggie Lemoine was part of a group of leafleters at the first Giant store leafleted where only union organizers were present. After passing out leaflets at the gas station

[109] GC Exh.130.

door and fuel pumps for about 30-40 minutes, a gas station clerk came out and told them that they had to leave the property. They went to the public sidewalk and continued to handbill.

The next day, Lemoine was joined by Respondent's driver, Anthony Guara. Guara wore a Respondent Western Refining Wholesale, Inc. uniform shirt that had Guara's name imprinted. At this gas station/store in Bernalillo, New Mexico, a gas station clerk came out and told them that the manager called and said the leafleters had to leave the property.

At the fifth store in Rio Rancho, New Mexico, Lemoine joined with another group that included Respondent's driver, Josh Perez. Perez was also wearing Respondent's uniform shirt. At this store, when Lemoine's group arrived, Perez' group told Lemoine that they had been asked to leave.

The combined groups then went to the Giant gas station on Paradise Road in Albuquerque. At this store, a clerk wearing a Giant uniform came out and said they had to leave. Perez told her that he was a Western employee, and the clerk said that her manager said they had to leave or she would call the police. Perez said that he had a right to be there, and the clerk went inside, and came back out a few minutes later. The clerk told the group that they had to leave the property, or she will "have to call the police." The handbillers departed.

At the next Giant gas station on North Coors in Albuquerque, the same group was present handbilling. After about 15 minutes, a store clerk came out and told them her manager said that, if they did not get off the property, she would call the police. The group left.

The same group proceeded to another Giant gas station on Alameda in Albuquerque, and after about a half-hour of leafleting a clerk came out and told them they could talk to customers but couldn't handbill. The group continued to handbill, and later the clerk told them that they had to leave or she would call the police. About 20 minutes later, the police arrived and went inside the store. About 10 minutes after that, a police officer told the group that it was okay for them to stay because he had spoken with the manager who said they weren't doing any harm. They continued to handbill for another 45 minutes.

The next day Lemoine handbilled with another group of union organizers and Respondent's drivers, including drivers Ted Schneider and Jerome Padilla.

At the Giant gas station/ store on Central Avenue in Albuquerque the gas station clerk told them they had to leave or the police would be called. At the next store on Golf Course Boulevard in Albuquerque when they engaged in handbilling they were asked to leave.

The union organizers and drivers handbilled the following weekend. The organizers were joined by Respondent's drivers Dean Perry, Kent Hodges, and Ever Rodriguez. The drivers were wearing their work uniform shirts. They went to Giant Store #6033, in Los Lunas, near Peralta, New Mexico. The group told the store manager that they were going to leaflet, and they began handbilling customers by the store, and at the pumps. After about 30 minutes, the manager told them that they had to leave. The group then went to Giant store #6043 in Los Lunas, New Mexico.

Respondent Western Refining Southwest, Inc.'s district manager Susan Montoya arrived at store #6043 while the drivers were standing on the walkway that runs directly in front of the Giant gas station/store doors, handing fliers to people going in and out of the store. Montoya told the handbillers that solicitation and loitering were not permitted on the property and she ordered them to leave. One of the drivers told Montoya that he worked for Respondent. Montoya replied "in that case, you know we don't allow loitering."[110] Montoya admitted that she considers the entire store property a work area, including parking lots and bathrooms. Montoya admitted that she was enforcing both Respondent's loitering rule, and Respondent's no-solicitation rule, when she told the handbillers to leave the property.

b. Respondent's practice regarding other non-work related solicitations/distributions

The record reflects that non-employees frequently engage in solicitation and distribution on Respondent Western Refining Southwest, Inc.'s gas station property.

In April 2012, Respondent's driver Ray Dazahn, who delivers fuel to Giant gas stations, picked up a flyer[111] for a breast cancer fundraiser that was on the counter of a Giant retail store, near the register. Dazhan has seen this flier at three other Giant stores. Also in April 2012, Respondent's driver Dean Perry purchased a candy bar[112] for a church fundraiser at a Giant gas station in Albuquerque. The person selling the candy was standing just outside the front doors of the Giant gas station. Since the summer of 2011, Perry has also seen individuals standing near the Giant gas pumps selling candy and snacks. In the summer of 2011, Respondent's driver Ever Rodriguez, while making fuel deliveries at Giant gas stations, has seen cheerleaders washing car windows to raise money, ROTC fundraisers, and a butcher shop passing out flyers to promote their business.

Robert "Rocky" Sprouse, the vice president of retail for Respondent Western Refining Southwest, Inc. admitted that he has seen collection canisters for a baseball team and one for a cancer fundraiser, even though his managers know those are unauthorized. There is no evidence that Sprouse had these unauthorized solicitors removed.

c. The law

In *Babcock & Wilcox*, 315 U.S. 105, 112 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court has held that an employer may limit nonemployee distribution of union literature so long as it does not discriminate against union literature by allowing *other* distribution. *Knogo Corp.*, 262 NLRB 1346, 1362 fn. 58 (1982).

In *New York New York Hotel & Casino,* 356 NLRB No 119 (2011), the Board held that off-duty employees had a right to be present in nonworking areas of the hotel open to the public for organizational purposes. In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the Board found a rule limiting off-duty employee distribution in customer and public areas unlawful.

[110] Tr. 62, LL. 11–13.
[111] GC Exh. 155.
[112] GC Exh. 140.

Except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 655 (2004), the Board found that a rule prohibiting loitering on company property without permission from the Administrator violated Section 8(a)(1) of the Act because it would reasonably chill employees in the exercise of their Section 7 rights.

In *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000), a hotel-casino, claimed that the entire property was a working area because employees, at times, cleaned and maintained the parking lot, and security guards patrolled the lot. In *Santa Fe Hotel*, the Board said that to hold areas such as the handbilled entrances outside its hotel-casino a work area would effectively destroy the right of employees to distribute literature.

Further an employer who requested police assistance to remove nonemployee handbillers from its property where the employer permitted commercial vendors and civic organizations to conduct fundraising *violates the Act. Great Scot,* 309 NLRB 548, 549 (1992).

d. The analysis

Complaint paragraphs 6(a) through (j) allege that from on about November 4to 11, 2011, Respondent Giant at several of Respondent's gas station/stores in Santa Fe and Albuquerque, New Mexico (1) denied its off-duty employees access to parking lots and other outside nonworking areas because they were engaged in union activities; (2) threatened to call the police on its employees because they were engaged in union activities; (3) discriminatorily denied union organizers access to parking lots and other outside nonworking areas because they were engaged in union activities; (4) threatened to call the police on the Unions' organizers because they were engaged in union activities; (5) called the police on the Union's organizers because they were engaged in union activities; and (6) called the police on its employees because they were engaged in union activities.

The facts reflect that both union organizers and Respondent's off-duty employees handbilled Respondent's customers at nonworking areas, including at the front doors to its stores and at the gas pumps and parking areas of its Western Refining Southwest, Inc. owned, Giant brand gas station/stores. The undisputed facts show that Respondent prohibited both the union organizers and its employees from handbilling by telling them that they had to leave the property. In the same areas Respondent had allowed other organizations to raise money, or advocate for their businesses, including cheerleaders, churches, butcher shops, and other persons selling candy and snacks. In such circumstances, Respondent's disparate enforcement against the Union violates Section 8(a)(1) of the Act.

Similarly, Respondent's ban of its own off-duty employees from the public areas of its property to engage in Section 7 activity likewise violated Section 8(a)(1) of the Act. *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723 (2000).

Likewise, the threat to call police and the calling of police was designed to prevent both the union organizers and off-duty employees' exercise of their Section 7 rights and violated Section 8(a)(1) of the Act. *Scamp Auto Rental 1, Inc*., 314 NLRB 1089, 1093–1094 (1994).

22. Respondent's discrimination against the drivers

a. Leroy Reggensberg

(1) The facts

Leroy Reggensberg has worked for Respondent Western Refining Wholesale, Inc. as a driver at its Gallup terminal since 1997. In May 2011, Reggensberg began organizing Respondent's drivers by handing out and collecting Worker Contact Cards[113] that contained only employee contact information such as phone numbers and addresses. Reggensberg passed out these cards and spoke with other drivers regularly at the drivers' room and parking lot at the Gallup rack facility. In June 2011, Reggensberg held a union meeting at his house in Gallup, New Mexico. Nine drivers attended the meeting, and signed a union committee pledge.[114]

When Reggensberg's pay started to decrease, he decided to resign his employment with Respondent on Friday, July 8, 2011. Reggensberg called Townsend and gave 2 weeks-notice. Reggensberg told Townsend that he was unhappy with the job because he could not make any money and could not afford to work there anymore.

As I have found above, on the next day, July 9, 2011, Reggensberg attended a company picnic at McGaffey Park. During the picnic, Curtwright approached Reggensberg and asked him what he was doing there and why he was leaving the company. Reggensberg replied that he had to work to support himself. Curtwright then told Reggensberg he was supposed to be having a union meeting at his house. Reggensberg said no because he was at the company picnic. Curtwright said he had heard that from Townsend.

After the conversation with Curtwright, Reggensberg again spoke with Townsend before leaving the picnic. Reggensberg asked Townsend why he told Curtwright that he was having a union meeting at his house. Townsend told him that some drivers had said that Reggensberg was having a meeting, and he was also told that by Curwtright.

On Monday, July 11, 2011, Reggensberg while making deliveries, dispatch told Reggensberg that he had to speak with Townsend. Reggensberg called Townsend then went to his office at the Gallup facility, where the two met in Townsend's office. Townsend told Reggensberg that since he had given his 2-week's notice, Respondent was going to let him go that day. On Reggensberg's termination authorization, Townsend wrote, "Leroy is unhappy with dispatch."[115]

Curtwright, Pamela Scott, and Chris Proctor made the decision to advance Reggensberg's termination before the 2-week period had passed. Curtwright testified the reason was that Reggensberg, "wasn't real happy with the company. We figured it was probably a safety reason, to keep his mind focused."[116]

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[113] GC Exh. 24.
[114] GC Exh. 25.
[115] R. Exh. 3.
[116] Tr. 2587.

Since July 11, 2011, Reggensberg contacted the payroll department by phone several times because he never received his paycheck. Finally, in April 2012, Marjo Berry from Respondent's payroll department contacted Reggensberg asking if he had received his last paycheck. Reggensberg said that he had not, and Berry said she would send it to him. Reggensberg received his final check the week before April 15, 2012.

The evidence reflects that as of February 17, 2012, Respondent's payroll records[117] indicate that the data for Reggensberg's final paycheck of $2024.92 was input into the payroll system.[118] However, there is no evidence that the check was ever sent to Reggensberg. The original payroll checks have not been offered for the record. Respondent's payroll clerk Marjo Berry said Reggensberg's final check was cancelled[119] on September 26, 2011, and reissued that same date.[120] While Berry speculated that because Reggensberg failed to cash the original check it was cancelled and reissued, no probative explanation was given for the cancellation of the check. Again there is no evidence the reissued check was ever received by Reggensberg.

Not until February 17, 2012 did Respondent attempt to resolve Reggensberg's check when an email[121] was sent to Berry from HR regarding outstanding checks to five employees, including Reggensberg. Thereafter Berry contacted Reggensberg in late February or March 2012 about his payroll check. Berry claims she told Reggensberg he had an outstanding paycheck but he said he had received everything he was supposed to have. Later in March Berry told Reggensberg that Respondent was going to issue him a new check. Reggensberg told Berry that the last check he had received from Respondent was for $600. I find it hard to believe that Reggensberg would have thought a $600 dollar check would have satisfied Respondent's final payroll obligation to him in the sum of $2024.92. Moreover while Berry claims to have spoken to Reggensberg for the first time in March 2012, this does not preclude the probability that Reggensberg may have spoken to other individuals at Respondent about his paycheck before March. I credit Reggensberg that he called Respondent several times before March 2012 about his paycheck.

While Curtwright denies knowing that Reggensberg was a union activist, Curtwright's denial is simply not credible. Curtwright testified that he had not heard that employees were passing out union cards at the time of Respondent's company picnic. However, on June 30, 2011, Curtwright received an email[122] from Proctor informing him that employees had been passing out union cards. I have found that by July 9, 2011, both Curtwright and Townsend knew Reggensberg was having a union meeting at his house.

(2) The analysis

Complaint paragraph 7(a) alleges that on about July 12, 2011, Respondent accelerated the termination of employee Leroy Reggensberg.

[117] R. Exh. 56.
[118] Id. at p. 4.
[119] Id. at p. 3.
[120] Id. at p. 2.
[121] Id. at pp. 5–6.
[122] GC Exh. 40.

To establish a violation of Section 8(a)(3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that an individual's protected activity was a motivating factor in the employer's action. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Once the General Counsel makes this showing, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected conduct. To sustain its burden the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of that activity, that the activity was a substantial or motivating reason for the employer's action.

The General Counsel may meet its *Wright Line,* supra, burden with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances such as union animus, timing, or pretext may sustain the government's burden.

Furthermore, it may be found that where an employer's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); and *Fluor Daniel*, *Inc.*, 304 NLRB 970 (1991).

Motivation of antiunion animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490–492 (7th Cir. 1993). Direct evidence of union animus is not required to support such inference. *NLRB v. 50-White Freight Lines, Inc.,* 969 F.2d 401 (7th Cir. 1992). If it is found an employer's actions are pretextual, that is, either false or not relied on, the employer fails by definition to show it would have taken the same action in the absence of the protected conduct and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982), *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

The first burden the General Counsel must establish is employer knowledge of Reggensberg's union activity. Contrary to its assertion, Respondent was aware of Reggensberg's union activities by July 9, 2011, as shown by Curtwright's interrogation of Reggensberg and his statement that he was aware Reggensberg was having a union meeting at his house.

Respondent's antiunion animus is established by the numerous 8(a)(1) violations found above, including the violations directed directly towards Reggensberg. Respondent's decision to accelerate Reggensberg's resignation date is similar to the facts in *Gelita USA, Inc.,* 352 NLRB 406, 414–415 (2008). In *Gelita,* the company did not reject an employee's proposed date of resignation until the day after the supervisor unlawfully interrogated her about her union activity. The Board affirmed the ALJ who found the employer's proffered reasons for early termination pretext and found the early termination violated Section 8(a)(3) of the Act. Here, Respondent accepted Reggensberg's 2-week notice of resignation on July 8, 2011, but Proctor and Scott decided to accelerate his departure date only after Curtwright interrogated him at the picnic.

Respondent's contention that its decision was not motivated by antiunion animus is pretext. Curtwright claimed that the reason for accelerating the departure date was safety.

Respondent did not think that Reggensberg could be focused for the next 2 weeks because of his unhappiness with the company. There is no evidence that similarly situated employees have been terminated early because they could not be focused. I reject Respondent's contention that there is comparable evidence numerous other employees have resigned and been paid for the 2-week notice period. The instances cited by Respondent were all sales employees. Moreover, no reasons were given for why Respondent accepted their early resignations and there is a conspicuous absence of any safety concerns. Respondent's contention that "this is not a case in which some terrible adverse action has been taken against an employee" is absurd. The Board has addressed that issue in *Gelita,* supra.

The General Counsel's prima facie case has not been rebutted and Respondent's justification for accelerating Reggensberg's termination was pretext. The evidence in the record supports a finding that Respondent accelerated Reggensberg's resignation in violation of Section 8(a)(3) of the Act.

b. Kevin Taddy

Kevin Taddy has been employed by Respondent Western Refining Wholesale, Inc. as a driver since about 2007 in Albuquerque. His supervisor was Eric Burnham. Taddy loads his truck with fuel at Respondent's rack facility[123] in Gallup. In the spring of 2011, Taddy began attending union meetings and became a member of the union organizing committee. In mid-summer 2011, he went to Respondent's El Paso terminal with driver Ever Rodriguez and union organizer Charlie Stephenson to meet with Respondent's employees. Taddy also passed out union worker contact cards and spoke about the Union with drivers. In a July 16, 2011 letter[124] to Proctor from driver Monty Caudill, Taddy was identified as a union supporter. Taddy was also identified as an organizing committee member in the Union's September 14, 2011 letter[125] to Respondent. In October 2011, the LRI labor consultants rated[126] Taddy a very strong union supporter.

(1) The September 22, 2011 warning to Taddy

On September 22, 2011, Taddy was called to Burnham's office where Supervisor Jonas Armenta was also present. Burnham told Taddy that human resources had received complaints about him harassing drivers and trying to hand out union pamphlets to them on the rack, and that they didn't want him doing that because he could have employees mess up their loading situation or doing their job. Burnham said that Taddy would get sent home or have days off if he continued to do that. Burnham instructed Taddy not to be doing that on company time, but that he could do whatever he wanted to when he was off and on his own time.

Pamela Scott admitted that if Taddy's conduct continued, his verbal warning would have led to further discipline, because a written warning follows a verbal.

Complaint paragraph 7(c) alleges that on about September 21 to 28, Respondent issued an oral warning to its employee Kevin Taddy.

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[123] While at the loading rack, Taddy has seen other drivers talk with each other.
[124] GC Exh. 75, p. 4.
[125] GC Exh. 37, p. 2.
[126] GC Exhs. 74, p. 2; 76, p. 6.

The record reflects that when Burnham warned Taddy that next time he engaged in union talk or handed out union literature and talked union while on duty he would be sent home or have some days off, Respondent knew he was a union supporter. Monty Caudill's July 16, 2011 letter to Proctor identified Taddy as a union supporter. Taddy was also identified to Respondent as an organizing committee member in the Union's September 14, 2011 letter. I have found Burnham's warning to Taddy to be a violation of Section 8(a)(1) of the Act above because it threatened him for engaging in union activity. This establishes Respondent's animus. Accordingly, the General Counsel has met its burden under *Wright Line*, 251 NLRB 1083 (1980), of showing that Taddy's suspension was illegally motivated. Respondent has failed to rebut this presumption, as I have already rejected its argument that it was lawfully enforcing its no-distribution rule. In warning Taddy not to engage in union activity, Respondent violated Section 8(a)(3) of the Act.

(2) The October 26, 2011 suspension of Taddy

On October 26, 2011, around 4:00 a.m., Taddy parked his truck in front of the driver's room at the Gallup loading rack facility where drivers waited their turn to load. He had a union petition which he was asking drivers to sign. Taddy approached a driver named Joe, who was sitting in his parked truck, and asked Joe to sign the union petition which Joe refused to sign. Taddy then entered the front door of the guard shack/drivers' room. Ray Dazhan, Martin Guillen, and rack operator Leo Griego were present. Taddy went to the computers in the login room where he punched in his load number so that he could use the pumps at the loading rack. Without speaking directly to anyone, Taddy muttered to himself: "These guys want the Union but they don't want to help the cause. I am putting my neck out on the line for these guys. They don't want to help out. These guys are a bunch of pussies because they don't want to help the cause, and I am sticking my neck out for these guys and they are leaving me out to dry."[127] Taddy waited his turn to enter his load number on the computer, then walked directly into the adjacent driver's room and turned to the right, stopping in front of the coffee maker where an antiunion poster was taped to the wall. Taddy tore the 12-by-18 inch poster off the wall and placed it next to the coffee machine without damaging it. Respondent's security guard Marco Apachzio was at the driver's room doorway and told Taddy to go sit in his truck and if he did not he would be escorted off the property. Taddy followed Apachzio's orders and immediately walked out of the building directly to his truck in the parking lot. Taddy waited inside his truck for 10 to 15 minutes until it was his turn to load at the rack.

In an October 26, 2011 email[128] sent at 8:38 a.m. Scott reported to Rueda that she "had a 'Union Activist' blow up today ripping things down off the company bulletin board." In a follow up email[129] sent to Rueda about 10 minutes later, Scott added that while Taddy was waiting to load at the rack, he tore down Company union information and used profanity. Scott heard from Curtwright that Joe Quinones at the Gallup refinery told him that Taddy lost it up at the rack and started screaming and yelling and throwing a tantrum and ripping things off the wall, using profanity. Scott on further questioning clarified that this occurred at the driver's room. Scott claims that on October 26, 2011, she told Human Resources Generalist Redfearn to

[127] Tr. 1853, LL. 4–12.
[128] GC Exh. 94.
[129] Ibid.

start an investigation into the Taddy incident. While Scot claimed Taddy was suspended "upon" investigation, the discipline form is silent in this regard. Scott stated that she relied on the guard's notes[130] to decide to suspend Taddy. This was the only reliable information available to her since no witnesses had provided Scott with any information.

The guard's notes reviewed by Scott with respect to this incident reflect:

> 0355 (Kevin) Albq. driver came back inside again in guard shack and started riping (sic) posters that were posted on the wall off and I Apachito told Kevin not to be doing that and he turn around and told me they do that to us to (sic) and I Apachito told Kevin that he's destroying the Company property and told him to go out and wait in his truck for his turn to load up when it's his turn. So he Kevin went outside and got in his truck.[131]

No one spoke to Taddy, the guards, or to any witnesses until after the decision to suspend Taddy.

At the end of his shift around noontime on October 26, 2011 while Taddy was in Albuquerque, his Supervisor Burnham told him they needed to talk before he left for the day. Taddy went to Burnham's office where Burnham gave Taddy a disciplinary action record.[132] The disciplinary form stated Taddy would be suspended from October 26 to November 3, 2011, and states Taddy, "entered the Gallup drivers lounge and verbally assaulted Western Guard B. Begaye then ripped posters from walls . . . Destruction of materials and verbal assault will not be tolerated. . . . Further incidents will result in discipline up to termination."[133]

Respondent's employee handbook contains a standards of conduct[134] provision that states:

> POLICY:
>
> Employees are expected at all times to conduct themselves in a positive manner so as to promote the best interest of the Company. The following conduct is prohibited and may subject the employee involved to disciplinary action, up to an[d] including termination. The list of examples below is illustrative of the type of behavior that is not permitted, but is not intended to be all inclusive:
>
> * * *
>
> 4) Theft, destruction, defacement or misuse of Company property, funds, records, equipment, proprietary information or personal property of employees or customers.
>
> * * *

[130] GC Exh. 100.
[131] GC Exh. 100.
[132] GC Exh. 95.
[133] Ibid.
[134] GC Exh. 6, pp. 68–69.

10) Unprofessional language or behavior, profanity, mistreatment, disrespect or discourteous treatment of other employees or customers.

Taddy protested his 5-day suspension, explaining that the accusation of assault was false. Taddy gave a letter of protest to Burnham on November 3, 2011 explaining his version of facts for the first time.[135]

Scott conducted a supplemental investigation of the incident that led to Taddy's suspension. Scott reviewed Redfearn's investigation file she had created after Taddy's suspension. The file contained no statements from Quinones or Joe, the driver who Taddy spoke with in the parking lot. Rather, Scott found that the file had a written statement from Taddy, some written statements from other drivers who were present in the drivers' room, the guard's notes, and a summary of Redfearn's investigation. Scott also learned that Redfearn did not speak to either of the guards during her investigation.

Scott concluded her supplemental investigation on November 24, 2012, and found that Taddy did not verbally assault security guard B. Begaye or any other guard. As part of the supplemental investigation, Scott reviewed statements written by Shawn Hale and Ray Dazhan which confirmed that Taddy had not verbally assaulted B. Begaye. After reviewing the log written by security guard Apachzio, Scott understood he was the guard involved in the incident with Taddy, not Begaye.

Scott admits that the notes written by Apachzio do not mention a verbal assault or that Taddy directed foul language towards him or anyone else. There is no mention that Taddy created a hostile work environment. Despite the lack of any evidence, Scott concluded that Taddy had created a hostile work environment in the driver's room area by using foul language, which she considers unprofessional for truck drivers. Scott ended the investigation with an addendum to Taddy's file noting that he created a hostile work environment on October 26, 2011.

After her investigation, Scott told Taddy the Respondent stood by its suspension. Taddy asked if it would affect his bonus pay and Scott replied it would.

Complaint paragraph 7(f) alleges that on about October 26, 2011, Respondent suspended its employee Kevin Taddy.

As noted above the first element of the General Counsel's prima facie case has been established. The evidence shows that when Taddy was suspended in October 2011, Respondent knew he was a union supporter. By October 26, 2011, the LRI consultants had identified Taddy as a strong union supporter. In addition, the General Counsel has established through Respondent's various 8(a)(1) violations, including the threats made directly to Taddy, that it harbored antiunion animus. Accordingly, the General Counsel has met its burden under *Wright Line*, 251 NLRB 1083 (1980), of showing that Taddy's suspension was illegally motivated. The burden shifts to Respondent to show that it would have suspended Taddy even in the absence of his union activity.

[135] GC Exh. 102.

In its defense, Respondent contends it was enforcing its code of conduct rules that prohibit destruction of property and use of profanity when it suspended Taddy, relying upon the guard's notes to supply the information necessary to make a determination that the rules had been violated. Respondent argues an employer does not need to prove that the disciplined employee actually committed the misconduct alleged. Rather, it need only show that it had a reasonable belief that the employee committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee. *McKesson Drug Co.,* 337 NLRB 935, 937 fn. 7 (2002). Respondent contends that its action is consistent with its past disciplinary actions.

There is no real dispute that Taddy ripped a poster off the wall in the drivers' room and used profanity in the same area. However, there was no evidence at the time Scott issued Taddy's suspension that he had destroyed the poster. The guard's notes merely indicated it was ripped off the wall. The punishment meted out to Taddy seems out of proportion to the seriousness of the incident. Contrary to Respondent's assertion, its evidence of prior discipline when there were no union activities going on, seems less severe than that given to Taddy.[136] From 2005 to 2012, Respondent issued only three suspensions for harassment. In one case there were threats of physical and verbal assault by employees against coworkers. In another case the employee used course language to a customer, and in the third case the employee had multiple incidents of verbal abuse of customers and coworkers. During the same period Respondent issued six written warnings to employees for assault, a physical attack upon another employee, a threat to a coworker, use of foul language by a supervisor in the presence of other employees, arguing with a customer, and a second warning for horseplay that involved spraying a coworker with hand sanitizer. There were seven oral warnings for harassment of a coworker, verbal harassment of another driver, a dispute with another employee, farting and using foul language toward another employee, yelling at another employee, a second warning to an employee for a dispute with another employee, and using foul language. Based on this evidence, Taddy's suspension is out of all proportion to prior discipline. Here, Taddy did not direct his profanity to anyone, nor does the guard's record reflect that anyone felt harassed. Moreover at the time Scott decided to suspend Taddy, she had no evidence that he had destroyed company property.

This historical record of Respondent's discipline reflects disparate treatment of Taddy and belies Respondent's assertion that it suspended Taddy for cause. *Guardian Automotive Trim, Inc.*, 340 NLRB 475 fn.1 (2003); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002.

Respondent's rush to judgment precluded a meaningful investigation and is further evidence of Respondent's unlawful motive as well as pretext. *Firestone Textile Co.*, 203 NLRB 89, 95 (1973). Since I find Respondent's proferred reasons for Taddy's suspension were pretext, it precludes finding that Respondent would have issued a 5-day suspension to Taddy despite his union activities. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

I conclude that Taddy's suspension violated Section 8(a)(3) of the Act.

[136] GC Exh. 156, R. Exh. 25.

23. Obie Frazier

Obie Frazier has worked for Respondent as a truckdriver since about 2007 at the Bloomfield terminal. Frazier began organizing Respondent's drivers in the spring of 2011, and he was named as a member of the organizing committee by the Union in a letter dated September 14, 2011. Respondent admitted that Frazier was a union supporter. His Supervisor Lynn Milton admitted Frazier's union support was known to everyone at the Bloomfield terminal. Frazier attended union organizing committee meetings, including one at a public library in Aztec, New Mexico, on October 24, 2011. Frazier told drivers about the union meetings in the yard at Bloomfield. Milton admits he saw Frazier talking with other drivers about the Union in the parking lot.

a. The September 21, 2011 warning to Frazier

(1) The facts

On about September 21, 2011, Frazier was called to Redfearn's office where Pamela Scott was also present. Redfearn told Frazier that Respondent had reports of him talking union business on the rack in Bloomfield, and she was giving him a "friendly reminder" that it was not allowed. Frazier asked Redfearn for the names of the drivers so that he could apologize to them if he had offended them. However, Redfearn refused to disclose the names of the drivers to Frazier.

In an October 7, 2011 email[137] to Rueda, Scott confirmed that 2 weeks ago she had warned Frazier about talking about the Union on the rack and that she, ". . . told him if I had to talk with him again it would be more serious consequences."

Scott admitted Respondent did not have any witnesses detailing the nature of Frazier's solicitation at the rack at the time she gave him this verbal warning.

(2) The analysis

Complaint paragraph 7(d) alleges that on September 23, 2011, Respondent issued its employee Obie Frazier an oral warning.

The General Counsel has met its burden in proving the elements of a prima facie case of discrimination in the case of Frazier's September 21, 2011 warning. *Praxair Distribution, Inc.,* 357 NLRB No. 91, slip op. at 1 fn. 2 (2011).

There is no dispute that Respondent knew Frazier was engaged in union activities. Milton admitted Respondent knew Frazier was very open in his support for the Union. Respondent's antiunion animus is evident in its numerous 8(a)(1) violations, as found above. I have previously found that Scott's threatening remarks about Frazier's continued union discussions violated Section 8(a)(1) of the Act. Those comments also establish her animus toward his union activity. The absence of any evidence as to where Frazier spoke to coworkers

[137] GC Exh. 103.

about the Union or what he said to them supports an inference of unlawful motivation since Respondent in fact had no idea if Frazier was violating its solicitation policy. The drivers' vague complaints about harassment and solicitation were a mere pretext to discipline a known union adherent. Respondent's argument that Frazier's discipline was lawful as enforcement of its solicitation policy for soliciting union authorization cards in a safety sensitive (???) is pretextual. First, there is no evidence that Respondent knew Frazier was distributing authorization cards to drivers while they were loading at the rack. Scott admitted there were no eye witnesses to Frazier soliciting at the rack, and Redfearn admitted she never asked the employees if they were fueling at the rack when they were approached by Frazier. At most, Respondent knew that Frazier talked about the Union in the general area of the rack, as is evidenced in Redfearn's statement to Frazier that they had reports of him "talking" at the rack. In an email about Frazier's discipline Scott describes that Frazier violated the solicitation policy by "talking union to other drivers while working."[138]

Respondent failed to prove it would have taken the same action against Frazier absent his union activity. Rather Respondent's warning to Frazier violated Section 8(a)(3) of the Act.

b. The November 14, 2011 warning to Frazier

(1) The facts

On November 14, 2011, Frazier went to Bloomfield Transportation Manager Rusty Royce's office where Royce gave Frazier a disciplinary action record form.[139] Royce explained that Frazier was being written up for copying union materials. The form stated:

> **Details**: On October 24th at approximately 5:30 a.m. Obie was observed by security making copies n a company copier. When he was done the security officer looked in the printer + found a union meeting notification that was left behind by Obie.
>
> **Why this is a problem for the company or department:** This is an unauthorized use of company equipment for personal use.
>
> **Specific changes in performance or behavior which must occur, including date for compliance:** Obie must not use any company property for personal use. If there is any further incidents of this nature, by useing (sic) company property for personal use or doing personal business on company time, this will be grounds for immediate termination.
> **This will effect 4th quarter bonus.**

The facts that resulted in this warning reflect that on October 24, 2011, security guard Valentine Gonzales told Royce he found a union flier on the copy machine in the Bloomfield driver's room. Royce relayed this to Milton. Gonzales told Milton that he saw Frazier using the copy machine in the driver's room in Bloomfield, then, later checked the copy machine when Frazier

[138] GC Exh. 103.
[139] GC Exh. 106.

left and found a copy of a union flier. Gonzales gave Milton the flier he found on the copy machine.

In his investigation, Milton did not ask Gonzales if he saw Frazier place the union flier on the copy machine, nor did Milton ask Gonzales where he was standing when he saw Frazier using the copy machine. There is no evidence how much time elapsed between when Gonzalez saw Frazier at the copy machine and when he recovered the flyer. When Redfearn spoke with Gonzales a few days after she learned of the incident, she failed to ask him when he saw Frazier make copies or how soon after he took the union flier from the copy machine.

On November 8, 2011, Scott emailed[140] Rueda, Goode, and Proctor recommending Respondent issue a written warning to Frazier for using Respondent's supplies for personal use.

Scott considered Frazier's time with Respondent, the cost the company incurred for the incident, and past practice with other drivers in deciding to discipline Frazier.

Respondent's employee handbook contains a standards of conduct[141] provision that states:

> POLICY:
>
> Employees are expected at all times to conduct themselves in a positive manner so as to promote the best interest of the Company. The following conduct is prohibited and may subject the employee involved to disciplinary action, up to an[d] including termination. The list of examples below is illustrative of the type of behavior that is not permitted, but is not intended to be all inclusive:
>
> * * *
>
> 3) Theft, destruction, defacement or misuse of Company property, funds, records, equipment, proprietary information or personal property of employees or customers.

Scott, Milton, and Redfearn admitted that Respondent had never disciplined another driver for personal use of the copy machine.

The record reflects that Respondent does not require that an employee ask for permission to use the copy machine even though both Milton and Redfearn admitted that employees use the copy machine regularly. Neither Milton nor Redfearn monitor what the drivers are copying. This was the first time the security guard had reported that a driver was using the copy machine for personal use.

Drivers use the copy machines to make copies of their paystubs, invoices, trip sheets, and mileage logs for their personal records. Milton further admitted that employees are permitted to use Respondent's property, including IT equipment, for personal purposes. Milton browses

[140] GC Exh. 107.
[141] GC Exh. 6, pp. 68–69.

internet websites to check stock reports at least twice a week. He has never been disciplined for viewing the stock reports while using the work computer.

(2) The analysis

Complaint paragraph 7(g) alleges that on November 14, 2011, Respondent issued its employee Obie Frazier a written warning.

As noted above, the General Counsel has established the elements of knowledge of Frazier's union activities and antiunion animus necessary to establish a prima facie case of a violation of Section 8(a)(3) of the Act, contrary to Respondent's assertion that it bore no animus toward Frazier. This argument is without merit since I have found numerous incidents of violations of Section 8(a)(1) of the Act by Respondent, indicating its general hostility to the Union and have also found Respondent violated Section 8(a)(1) of the Act in warning Frazier that if he continued to engage in union activity it would lead to more serious discipline.

That Frazier's union activities motivated Respondent's discipline is also established. Respondent's unlawful motive is evident in the disparate treatment of Frazier. At hearing, Scott, Redfearn, Milton, and Curtwright admit that employees had access to the copy machine without oversight by Respondent. Thus, drivers copied a plethora of documents for their personal use. Curtwright admitted it was just not really that big of a deal if someone uses the copy machine or makes a personal phone call.

Contrary to Respondent's argument that Jesse Leath's discipline[142] is similar to Frazier's, the downloading of pornography onto a work computer during worktime is not comparable to the facts in Frazier's case. Moreover, Respondent allowed Jesse Leath to keep his bonus despite his admission that he downloaded porn onto Respondent's computers. Nor is the discipline[143] issued to a variety of Respondent's employees, discussed in detail above, in any way comparable to Frazier's discipline. Having found the General Counsel has established a prima facie case Respondent violated Section 8(a)(3) of the Act, the burden shifts to Respondent to show it would have disciplined Frazier despite his union activity.

Respondent contends it had a good-faith belief that Frazier had, in fact, used its equipment for personal use in violation of its stated policy prohibiting such conduct. Contrary to Respondent's assertion, a careful investigation was not conducted. No one inquired of the security guard how long a period of time elapsed between when he saw Frazier at the copy machine and when he discovered the union flyer. The presumption was that since Frazier was at the copy machine and since the guard sometime later found a union flyer, it was Frazier who made the copy. Such an assumption is invalid if a substantial period of time had passed.

Moreover the evidence of disparate treatment of Frazier supplies evidence that Respondent was merely seizing upon a pretextual reason to discipline a known union supporter. Respondent's defense must fail.

[142] R. Exh. 45.
[143] R. Exh. 25.

I conclude that the written warning of Frazier together with the denial of his bonus constitutes a violation of Section 8(a)(3) of the Act.

c. The January 27, 2012 warning to Frazier

(1) The facts

On January 27, 2012, Frazier was brought to a meeting in Bloomfield with Human Resources Generalist Cathyrne Valdez and Royce. Valdez gave Frazier a performance discussion record[144] which stated Frazier was being disciplined for disrespectful behavior and insubordination. The form stated that Frazier had been told by dispatcher Ruby Smith on January 26, 2011, that Milton was talking to drivers about a new safety program, that Frazier told Ruby he was off the clock and I don't have time for this BS. The form said failure to show up for the meeting showed lack of respect and insubordination. The assumption in the discipline is that Frazier was aware of a scheduled meeting. Frazier told Valdez and Royce that he did not know about the morning meeting, and disputed the accusations in the disciplinary form. Valdez said dispatcher Ruby Smith informed Frazier that he had a meeting scheduled, to which he replied that he was not going to attend. Despite the significance of her testimony, Ruby Smith was never called as a witness.

The events leading to Frazier's January 27, 2012 discipline are that on about January 19, 2012, Frazier received a notice[145] in his mail box at the Bloomfield office informing him of meetings with drivers regarding Respondent's new safety/bonus program. The memo indicated that from 6 a.m. on January 25, 2012, until the evening of January 27, 2012, one-on-one meetings with drivers would be conducted. However, Frazier was not scheduled for a specific meeting time with management to review the program. On January 26, 2012, around 6 p.m., Frazier was leaving work when he had a conversation with dispatcher Ruby Smith in the drivers' room at the Bloomfield terminal. According to Frazier, Smith asked him if he was going to go to the meeting that night with Lynn Milton. Frazier said no, he was off the clock and that he had heard it was a bunch of "BS" that he wouldn't care for anyway. Smith smiled in response to Frazier's comment. Frazier contends Smith did not tell him that Milton was waiting at the office to meet with him or that he had been scheduled for a meeting the following morning. Frazier ended his conversation with Smith and left for the day.

On the following morning, January 27, 2012, Frazier reported to Bloomfield and was dispatched to Albuquerque. While at the terminal that morning, no one informed Frazier he had a meeting at 6 a.m. As he was driving to Albuquerque at around 5:30 a.m., Frazier received a message on the truck's Qualcomm system, notifying him to call Lynn Milton. At approximately 5:45 a.m., Frazier pulled the truck over to the side of the road and called Milton from his personal cell phone. Milton told Frazier that he needed to see Frazier about the bonus meetings. Frazier immediately returned to the office, arriving about 15 minutes later.

Milton called Frazier to the conference room where Scott, Tony Smith, and Valdez were waiting. Smith began the meeting by reviewing the safety program with Frazier. Later Scott said that Ruby Smith had told Frazier he was supposed to be at the meeting that morning. Milton

[144] GC Exh. 23.
[145] R. Exh. 52.

also said he had sent Frazier a text message and left a voicemail for him about the meeting. However, Frazier claimed he had not received either prior to the meeting. When Frazier denied that Smith asked him to be there in the morning, Scott said Respondent would investigate and in finding that he was wrong, he would be brought up on charges of insubordination.

Scott admitted that she invited Frazier to quit during the January 27, 2012 meeting. She asked Frazier "Do you enjoy working for Western?" When Frazier told her that he did not like working for Western, Scott said, "I would hate to have to come to work every day and hate my job. There's other jobs out there. If you don't like it here, you know, I can help you find another job out there. There's other jobs out there that maybe you could be happier at."[146] Scott also told Frazier she would be more than happy to write his letter of recommendation. Scott further admitted she said, "There's other union jobs out there. If you want to work for a union job, there's union shops out there."[147]

Approximately 2 hours after leaving the January 27, 2012 meeting with Milton, Scott, Tony Smith, and Valdez, Frazier received a text message on his personal cell phone at 9:12 a.m. from Milton, stating "Obie, please come in at 6:00 in the morning. We want to go over the new safety program with you. This will take about 20 minutes then they will have a dispa." This text message was read into the record and reflects it was received from Milton on Frazier's phone at 9:12 a.m.[148] Other than the text message Frazier received on January 27, 2012, he did not receive a voicemail on his cell phone from Milton or anyone else from Respondent notifying him of the safety program meeting that morning.

Emails[149] from Curtwright, Milton, and Proctor, show that the decision to discipline Frazier for failing to attend either the January 26 or 27, 2012 meetings were made on the assumption that dispatcher Ruby Smith told Frazier he had to be at the meetings. Yet Milton's January 27, 2012 6:19 a.m. email[150] to Curtwright simply states that yesterday Ruby tried to call Frazier unsuccessfully and that when he got to the yard at 5:27 p.m. Ruby told Frazier Milton needed to meet with him and Frazier told her he was off the clock. Milton's email does not indicate that Smith ever told Frazier about a 6 a.m. meeting on January 27, 2012.

The absence of the key witness in this whole episode is troubling. No explanation was given for why Respondent failed to call Ruby Smith as a witness. In the absence of an explanation for her absence, I am persuaded that an adverse inference should be drawn that, if called, Smith would have testified adversely to Respondent's interests.

b. The analysis

Complaint paragraph 7(j) alleges that on January 27, 2011, Respondent issued its employee Obie Frazier a written warning.

[146] Tr. 2457.
[147] Ibid.
[148] Tr. 1365, LL. 1–21.
[149] GC Exh. 145, p. 2.
[150] Ibid.

I have previously found that Respondent had knowledge of Frazier's union activities and harbored antiunion animus toward him. Further evidence of Respondent's animus toward Frazier was demonstrated in Scott's invitation to Frazier to quit while she suggested that he find another union job. The evidence establishes that Frazier's protected activity motivated Respondent, to once again, discipline Frazier, establishing a prima facie violation of Section 8(a)(3).

Respondent's disparate treatment of Frazier is also revealing of its true motive in disciplining him. Respondent was able to produce evidence that it disciplined[151] only one employee for failing to appear for a mandatory safety meeting. Jesse Leath failed to appear for the meetings twice. With notice, Frazier attended the safety meeting.

Respondent's proffered justification that it had scheduled Frazier for a meeting by text and voicemail are unsupported by the evidence. Despite having testified that she looked at a computer screen and saw a Qualcomm message sent to Frazier, Respondent failed to produce any record that Frazier had been sent a Qualcomm message asking him to attend the safety meeting at any time prior to the message he received at 9:12 a.m. the morning of January 27, 2012. Frazier did not receive Milton's text message about the meeting until over 3 hours after the meeting was scheduled. Respondent did not prove it would have taken the same action absent Frazier's union activity, and had violated Section 8(a)(3) of the Act.

Respondent contends Frazier was issued the performance discussion based upon a good-faith belief that he failed and refused to attend a meeting when told to do so. However, I have found that the presumption upon which the entire discipline was based, that Frazier was given notice to attend the safety meeting, is lacking. Respondent's entire case rests upon whether Ruby Smith told Frazier he was to attend the safety meeting. The failure to call Smith has led me to draw an adverse inference that she would not have said she gave Frazier notice. There is also no secondary evidence that Frazier had notice. Milton's emails simply states Smith tried to call Frazier unsuccessfully and at the end of his shift at 5:30 p.m. on January 26, 2012, told him he had a meeting with Milton without reference to a time or date.

I conclude that Respondent's proffered defense must fall in the absence of a reasonable belief that Frazier had notice of the meeting. I find this defense is pretext. I further conclude that Respondent violated Section 8(a)(3) of the Act in issuing Frazier this warning.

24. Roberto Aguirre

a. The September 26, 2011 warning of Roberto Aguirre

Roberto Aguirre was employed by Respondent as a driver at its El Paso, Texas facility. By September 26, 2011, Respondent knew that Aguirre was engaged in union activities as a result of the Teamster's letter of September 14, 2011. In a September 28, 2011 email, El Paso Terminal Manager Mike Gailey named Aguirre as a driver who began union organizing in El

[151] R. Exh. 46.

Paso.[152] As noted above, Scott decided to take action against Aguirre by responding with an email[153] to Gailey of the same date advising him to:

> Please bring Roberto in and talk with him about pushing Union Activities while he is on Company time and while the other drivers are working and on Company time. Let him know he can only talk to other drivers at the terminal in the break room when he is not working and when the other Drivers are not working.
>
> Let Roberto know this is a verbal warning, and make sure he understands this will not be tolerated and next time he will be sent home.

It is undisputed that Gailey had seen Aguirre talking to other drivers at the rack.

b. The October 20, 2011 verbal warning

(1) The facts

On about October 4, 2011, Aguirre went to Gailey's office about a pay question and later asked Gailey if he was able to arrange a meeting with the driver who previously accused him of harassment. Gailey told Aguirre that the driver was covered under the Whistle Blower Act and there was nothing he could do. Aguirre said that was bullshit. Later, Gailey emailed[154] Scott and Curtwright noting that Aguirre asked for the names of the drivers who made accusations against him. Gailey stated that he refused to reveal any names.

On October 7, 2011, Gailey sent Scott, Proctor, and Curtwright an email[155] informing them that driver Adrian Trillo reported a conversation he had with Holguin and Aguirre at an undisclosed site at the loading rack on October 6, 2011. Gailey notes Holguin approached Trillo and said Aguirre wanted to talk to him about signing up for the Union. Trillo told Holguin that he was not going to sign up and not to bother him again about this.

On October 10, 2011, Scott emailed[156] Gailey with instructions to search for "written statements from drivers who said they were being harassed by Pro Union Drivers (sic)." Scott indicated the "reason is that they would need to be soliciting for the Unions when they were talking with drivers," and that the written statements should identify "where and date and time." Respondent did not produce any driver statements accusing Aguirre of harassment, and Scott admitted at hearing that the employees refused to write such statements.

On October 20, 2011, Scott had a telephone conversation with Aguirre. Scott told Aguirre that she heard he continued to harass drivers about the Union, and that Respondent would not tolerate such conduct. Aguirre denied the accusations but Scott said Aguirre got "out of hand," scared Gailey, and cursed in front of an office worker. During this call, Scott admitted

[152] GC Exh. 78, p. 2.
[153] Ibid.
[154] GC Exh. 77.
[155] GC Exh. 66.
[156] GC Exh. 104.

that she told Aguirre "you cannot talk about union on company property while you're on company time."[157] In an October 21, 2011 email,[158] Scott admitted that she told Aguirre that the next time she spoke with him "it will not be as pleasant of a conversation."

(2) The analysis

Complaint paragraph 7(e) alleges that on about September 26, 2011, and October 20, 2011, Respondent issued its employee Roberto Aguirre oral warnings.

By September 26, 2011, Respondent knew that Aguirre was a union activist due to the Teamster's letter of September 14, 2011. It is undisputed that Gailey had seen Aguirre talking to other drivers at the rack and had identified Aguirre as union organizer at the El Paso terminal. Respondent's antiunion motivation is demonstrated by Scott's instructions to Gailey to talk with Aguirre about pushing union activities while he is on company time on the heels of Gailey disclosing that Aguirre was the initiator of the organizing in El Paso. Respondent's animus toward the Union and Aguirre is further evidence in Gailey and Scott's action against Aguirre by promulgating unlawful work rules and threatening Aguirre with further discipline if he continued to engage in union activity as found above.

Accordingly, the evidence supports a finding that Aguirre's September 26, 2011, verbal warning was a violation of Section 8(a)(3) of the Act.

When Scott verbally warned Aguirre on October 20, 2011 not to engage in union activity on company property while on company time, Respondent ranked Aguirre at the highest level of union support as a result of the LRI data. This warning substantiated Gailey's prior threat that Aguirre would be subject to other discipline for on-going union activity. Respondent's contention that Aguirre was issued the second warning for his verbal abuse with Gailey, is unsupported by the record. Scott's phone call made it clear she was giving Aguirre a warning for his continued union activity in talking union on company property on company time. The management discussions preliminary to Scott's warning mention nothing of getting out of hand or cursing, rather they focus on Aguirre's union activity.

There can be no conclusion other than Aguirre was warned by Scott because of his union activity while on company time and on company property in violation of Section 8(a)(3) of the Act.

25. The July 18, 2011 suspension of Reginald "Reggie" Lemoine

a. The facts

Reggie Lemoine started working for Respondent as a driver at its Albuquerque terminal in May 2010. Eric Burnham was his immediate supervisor. Lemoine became involved in the Union's organizing drive in about April 2011. Lemoine started talking to other drivers about organizing and passed out worker contact cards to drivers in Albuquerque, Bloomfield, and El Paso. He also spoke to drivers about the Union at the rack and in the drivers' room. Lemoine

[157] Tr. 2449.
[158] GC Exh. 109.

stated that Respondent Western Refining Wholesale, Inc.'s drivers spoke to each other about nonwork related issues at work. Lemoine said none of Respondent's managers supervisors said he could not talk to his coworkers at the rack.

Respondent had scheduled a town hall meeting on July 26, 2011 for its Albuquerque drivers. Before the meeting, Respondent put a comment box in the drivers' room so they could put their written comments in the box for Respondent to review before the town hall meeting.

About 2 weeks before the town hall meeting, someone took the comments out of the comment box. On July 14, 2011, Respondent issued a memorandum[159] informing employees that someone had removed all the questions from the comment box, and asked them to resubmit their questions. The memo also stated that, if Respondent discovered who removed these cards, they would be disciplined. Lemoine asked Burnham if it was true that the comment box was empty. Two to three days before he was suspended, Burnham told Lemoine that somebody took a coat hanger and fished the comments out of the box.

On July 16, 2011, Albuquerque driver Monty Caudill wrote a letter[160] about the suggestion box incident. In the letter Caudill said that on July 13, 2011, driver Todd Perando told him that Lemoine had removed the comments from the box. The letter added that in a phone conversation Lemoine, without prompting, said he had removed the comments with a coat hanger. Lemoine added he had thrown the comments away at the suggestion of the union organizer. Caudill's letter goes on to say that Lemoine told him all of the comments were blank save the one Caudill had written. Caudill's letter further states that on July 14, 2011, he told Lemoine and Taddy that what he had done was not the right thing to do in order to allow the union to come in to Western Refining. Lemoine and Taddy told Caudill they would continue to follow the union organizer's instructions.

Caudill was a former Teamsters union member and had been receiving a pension from the Union while working for Respondent but the pension had been suspended. Caudill and Steve Curtwright are close friends. Caudill admitted that he was opposed to the Union coming in to Respondent and that Curtwright knew this. Caudill believed that his Teamsters pension had been suspended by the Union because he was against the Union at Respondent.

Caudill admitted that he wrote the July 16, 2011 letter accusing Lemoine of stealing comments from the box because Lemoine pushed him. Caudill told Lemoine not to push him on the union issue, because if Lemoine did, it would go against him.

In a July 18, 2011 email,[161] Goode sent Caudill's letter regarding the comment box to Rueda, Scott, Proctor, and Stevens. Goode noted that Scott and Redfearn were "going to talk to the individuals involved this morning as part of the investigation."

On July 18, 2011, Lemoine was called into a meeting in Burnham's office with Scott, Redfearn, and Burnham. Scott told Lemoine he was brought into the meeting because the comment box was empty, and she accused him of taking the comments out of the box with a coat

[159] GC Exh. 75.
[160] GC Exh. 75, pp. 3–4.
[161] GC Exh. 75, p. 1.

hanger. She also told Lemoine that she had a handwritten statement saying that he took the comments. Scott suspended Lemoine for 5 days pending investigation. Lemoine's disciplinary action record[162] dated July 18, 2011 stated:

> Details: Investigation of missing questions for town hall meeting. It has been determined through an investigation that you took company property a violation of the code of conduct. See memo from 7-14-11.
>
> Any future violations will result in termination.

Lemoine denied the accusations. When Lemoine asked how he could be suspended for something he didn't do, especially since Scott had yet to conduct her investigation, Scott replied that she was "removing the problem from work." Apparently, Respondent decided they had the guilty party before doing an investigation.

After Lemoine's suspension, Scott claimed that she spoke with several drivers to investigate the missing comments but she could not remember their names. Scott claimed it was Redfearn's investigation, and Scott was just sitting in. Redfearn testified that it was Scott's investigation. While Scott testified that it is Respondent's procedure to take notes during an investigation, no notes of interviews with drivers were ever produced pursuant to the General Counsel's subpoena. Scott claimed that during an investigation they keep a file folder with the employee's name on it locked in a drawer in human resources. However, no notes on the Lemoine investigation were produced. I will draw an inference that had these records been produced they would have been adverse to Respondent.

Scott testified that during the investigation she learned that there was a group of drivers that had gathered when Lemoine was bragging about taking the comments out of the box, however, she was unable to remember the names of a single driver. During the investigation, Scott claimed that the first driver Respondent interviewed said he didn't want to get involved. The second driver, Wendell Haggerty, denied knowing anything about the incident. Scott couldn't remember the name of the third driver or what he looked like. This driver failed to corroborate Caudill. Like the first three witnesses, Scott could not remember the fourth driver's name. According to Scott, the unknown fourth driver told her that he was in the group of drivers when Lemoine was bragging about taking the comments using a coat hanger and tape. Despite the importance of the fourth driver's information, his name was never recorded. Respondent never interviewed a witness who saw Lemoine take the comments from the box.

Scott testified that Redfearn spoke with Caudill but cannot recall if Redfearn reported anything about the conversation. Redfearn claims that she only sat in on the interview, via telephone. Caudill denies he was interviewed by anyone.

Redfearn testified that she participated in the decision to discipline Lemoine for the comment box incident and that Respondent could not confirm that Lemoine had taken the comments. According to Redfearn, Lemoine should have been paid for his suspension.

[162] GC Exh. 83.

Taddy testified that Scott interviewed him about the comment box incident. Taddy testified that he was never present during any conversation between Lemoine and Caudill where Lemoine admitted taking the comments.

Ultimately, Respondent decided to believe the allegations contained in Caudill's letter and affirmed its decision to suspend Lemoine. Curtwright testified that he chose to believe Caudill over Reggie Lemoine, Todd Perando, Kevin Taddy, and Wendell Haggerty, who all denied Caudill's version of events, primarily because Caudill was willing to put his statement in writing and sign it. Of course, it was Curtwright who specifically asked Caudill to give him a written statement, and while Taddy, Perando, and Haggerty all denied the allegations, Respondent never asked any of them to provide a written statement.

Respondent contends that Caudill's letter was authentic and reliable since Respondent had not told anyone that a coat hanger had been used to fish out the comments. Thus, the admission by Lemoine in Caudill's letter that he had fished the comments out with a coat hanger shows how reliable Caudill's letter is. However, it appears that as early as July 15, 2011, Burnham was telling drivers how the comments had been removed. Caudill's letter was not written until July 16, 2011, when it appears it was common knowledge among Albuquerque drivers how the box had been penetrated. While Respondent may point to further evidence of the authenticity of Caudill's letter in Caudill's assertion that Lemoine told him that the only comment in the box was the comment Caudill placed there, at trial Caudill said that he never wrote a comment card for the suggestion box.

On July 22, 2011, Scott brought Lemoine into Burnham's office. At the meeting Scott told Lemoine that she had determined he had taken the comments from the comment box, and he would not be paid for the suspension.

I conclude that Respondent's investigation was a sham. Scott suspended Lemoine based solely upon Caudill's uncorroborated letter without verifying its truth with other witnesses. Ultimately, no one corroborated Caudill. To the contrary, the other witnesses said they never heard Lemoine admit taking the comments. I found Caudill to be an incredible witness who had an axe to grind with both the Union over his pension and Lemoine over his prounion views that were diametrically opposed to Caudill's antiunion sentiments. Curtwright's acceptance of Caudill's letter over the denials of Lemoine, Perando, Taddy, and Haggerty further buttresses my conclusion that this investigation was a sham.

b. The analysis

Complaint paragraph 7(h) alleges that on or about July 18, 2011, Respondent suspended its employee Reginald Lemoine.

Respondent contends that this allegation is barred by Section 10(b) of the Act. On the first day of the hearing, the General Counsel moved to amend the complaint to add an allegation that former driver Reginold Lemoine was unlawfully suspended on July 18, 2011.[163] His suspension had not been the subject of an unfair labor practice. Respondent opposed the motion but it was granted on the ground that it met the requirements of *Redd-I Inc.,* 290 NLRB

[163] GC Exh. 1(hh).

1115,1116 (1988), as modified by *Carney Hospital,* 350 NLRB 627, 630 (2007), based upon the charge filed in Case 28–CA–067703 on November 2, 2011,[164] in which it was alleged that Western Refining unlawfully suspended driver Kevin Taddy. Tr. 17–22. In *Redd-I*, the Board held that in deciding whether complaint amendments are closely related to allegations in the charge, the Board and the courts have looked at whether the amendments are factually and legally related to the charge. Complaint allegations are related to the charge when the violations alleged in the complaint are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The complaint must deal with the same subject matter and sequence of events although the specific events stated in the complaint may precede or follow those stated in the charge. Finally, complaint allegations are closely related when they arise from the same factual situation, are of the same class as, and clearly related to, the allegations set forth in the charge.

In *Carney Hospital*, the Board held that untimely 8(a)(1) charges could not be supported by timely filed 8(a)(3) charges. The Board found that "chronological coincidence during a union's campaign does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign." Id. at 630. However, the Board agreed that "a sufficient factual relationship can be established by showing that the timely and untimely alleged employer actions are 'part of an overall employer plan to undermine the union activity.'" Id. The Board added, in assessing the Redd-I test, where two sets of allegations "demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, we will find that the second prong of the *Redd-I* test has been satisfied." Id.

Here, I find that Lemoine's suspension was part of Respondent's ongoing reaction to undermine the Union's organizing efforts. Beginning with Reggensberg's early termination, then closely followed by Lemoine's suspension, the warnings to Aguirre, Taddy, and Frazier, and Frazier's suspension, interspersed with numerous threats, promises of benefits, and efforts to prevent its employees from engaging in union activity by discriminatorily applying various work rules, Respondent over a relatively short period of 6 months engaged in a program to defeat its employees' Section 7 rights.

Under both *Redd-I* and *Carney Hospital*, I find that the Lemoine complaint amendment is closely related to the charge that Taddy was discriminatorily disciplined and is not barred by Section 10(b) of the Act.

As previously discussed in order to establish a prima facie violation of Section 8(a)(3) of the Act, the General Counsel must establish Lemoine's union activity, Respondent's knowledge of that activity, and Respondent's action was motivated by its antiunion animus. *Praxair Distribution, Inc.*, 357 NLRB No. 91 (2011). Once these elements have been established, Respondent must show it would have taken the same action that would have been taken in the absence of Lemoine's protected conduct. Id., slip op. at 12.

[164] GC Exh. 1(c).

The record reflects that Lemoine engaged in a wide range of union activity prior to his discipline and that since Caudill's July 16, 2011 letter, Respondent was aware that Lemoine was involved in union organizing among its drivers.

Respondent's numerous 8(a)(1) violations, found above, establish its animus. *Avondale Industries, Inc.*, 329 NLRB 1064, 1071 fn. 4 (1999). Accordingly, the General Counsel has met its burden to show that Lemoine's union activities were the motivating factor in Respondent's decision to suspend him. The burden now shifts to Respondent to demonstrate that it would have suspended Lemoine even in the absence of his protected conduct.

Respondent's sham investigation into the comment box incident not only establishes its animus but precludes a finding that Respondent would have disciplined Lemoine despite his union activities. See *Firestone Textile Co.*, 203 NLRB 89, 95 (1973); *Burger King Corp.*, 279 NLRB 227, 239 (1986).

Respondent cannot meet its burden of showing, by a preponderance of the evidence, that it would have suspended Lemoine absent his support of the Union. *NLRB v. Transportation Management Corp.,* 462 US 393, 395 (1983). Its explanation for Lemoine's suspension is clearly pretext, and his suspension constitutes a violation of Section 8(a)(3) of the Act.

26. The October 2011 suspension of Jaime Holguin

a. The facts

Jaime Holguin has worked for Respondent as a driver for 6 years at the El Paso terminal where his supervisor is Mike Gailey. Holguin engaged in union organizing activities among Respondent's drivers and the Union identified him as an organizer in the Union's September 14, 2011 (???). In an email[165] dated October 7, 2011, Gailey reported to Scott, Proctor, and Curtwright that Holguin and fellow driver Roberto Aguirre were talking to another driver about the Union, and that Holguin specifically spoke to a driver about the Union while they were at the loading rack. Despite this accusation, Gailey admitted that drivers usually talk to each other at the loading rack. Gailey failed to note that this was a cause for discipline.

On October 25, 2011, Holguin was supposed to deliver a truck load of diesel fuel to a company named West Texas Express but instead went to another company, Old Dominion; both are Respondent's customers. At Old Dominion Holguin delivered one compartment of diesel fuel, approximately 2400 gallons, when he realized he had gone to the wrong customer. Holguin called Gailey, who told him to call dispatch. Holguin called dispatch who told him to go into the Old Dominion terminal and speak to the person in charge of fuel. The Old Dominion employee told Holguin that there was no problem because they had a delivery scheduled for the next day and to leave the entire load of fuel. Respondent admitted that Old Dominion did, in fact, have a delivery scheduled for the next day. Holguin called Respondent again, informing them that Old Dominion had asked that he leave the entire load, since they had a delivery scheduled the next day, and not to worry. Despite the apparent resolution of the problem, Respondent told Holguin to return to the rack, reload, and deliver to West Texas Express. Holguin delivered a full load to

[165] GC Exh. 66.

West Texas Express. The next day, Holguin went back to Old Dominion and completed their full delivery that had been ordered. Both companies paid Respondent for the fuel.

On October 26, 2011, Gailey told Holguin that he had to discipline him for the improper fuel delivery. Gailey gave Holguin a disciplinary action record form.[166] The disciplinary form noted Holguin had delivered 2400 gallons of diesel fuel to the wrong customer. It was also noted that Old Dominion, the customer to whom the fuel was wrongly delivered told customer service that they might take their business to another carrier. There is no evidence that Old Dominion ever did so. Further, while the form notes that Respondent had to make up the difference in price, the record does not support this contention since Old Dominion was scheduled to get the same type of fuel the next day. The form also reflects that Holguin was suspended for 5 working days, and he lost his fourth-quarter bonus.

Both Gailey and Steve Curtwright knew Holguin was a union supporter at the time of his discipline. Curtwright admitted that Holguin was one of the staunchest union supporters based upon the LRI rating information.

This was not the first time Holguin had gone to the wrong customer. On September 9, 2009, Holguin received a suspension for going to the wrong city to pick up a load. Holguin went to Tucson, Arizona, when he was supposed to go to Albuquerque, New Mexico. On July 9, 2009, Holguin received a written warning for delivering the wrong class of diesel fuel that required Respondent to pay taxes on the load.[167]

Curtwright claimed that Holguin was not treated differently than any other driver. Respondent introduced into evidence a suspension issued to driver Jerome Shirley on January 2, 2011, as a comparator discipline.[168] Shirley was suspended for 3 days for delivering the wrong fuel to the wrong location. The result was a "mix" of fuels in the customers' fuel tanks, causing Respondent to incur the costs of pumping out the fuel mix and making another delivery to the customer. In the Shirley discipline, Respondent had to pay for pumping out the entire fuel tank, for having it cleaned, and for refilling the fuel tank with the proper fuel. The cost of the mix was well over $10,000 to Respondent.[169] Shirley had been disciplined on September 23, 2010, for making a delivery at the wrong location.[170]

In investigating the Holguin incident, Redfearn spoke with Gailey to see if Holguin had delivered the load to the wrong store, and with Scott to see if Holguin had any previous disciplines. Redfearn did not speak to the two customers involved. The length of Holguin's suspension was based upon what Redfearn described as a "huge error" that caused Respondent to "collect from a customer that didn't order anything."[171] However, Respondent's records reflect that Old Dominion had placed an order for the same type of fuel Holguin delivered to them to be delivered the next day.

[166] GC Exh. 125.
[167] GC Exh. 128.
[168] R. Exh. 47.
[169] Tr. 2784–2786.
[170] Id. at 2.
[171] Tr. 2224, LL. 16–21.

b. The analysis

Complaint paragraph 7(i) alleges that on or about October 26, 2011, Respondent suspended its employee Jaime Holguin.

When Holguin was suspended Respondent knew he was engaged in union activities. Not long before Holguin's suspension, Gailey told Scott and Curtwright that Holguin had been talking about the Union to his coworkers. During that same time period the LRI consultants ranked Holguin a strong union supporter. Respondent's various 8(a)(1) violations, including the threats made directly to Holguin, demonstrate Respondent harbored antiunion animus. Accordingly, the General Counsel has met its burden under *Wright Line*, 251 NLRB 1083 (1980), of showing that Holguin's suspension was illegally motivated.

Respondent contends that it has issued similar discipline to other drivers and that this establishes it would have taken the same action against Holguin despite his union activities. The comparator discipline offered was that issued to driver Jerome Shirley on January 2, 2011.

Another driver, Daniel Gurule had multiple disciplines for wrong deliveries.[172] On August 25, 2009, Gurule received a written warning for delivering the wrong grade of fuel to a customer resulting in a mix requiring Respondent to deliver a higher octane fuel to increase octane. On September 29, 2009, Gurule was suspended for 3 days for creating a mix which cost Respondent money to remedy. On May 6, 2010, Gurule was given a written warning for overloading his truck and causing a spill which was costly to Respondent as product was lost in the spill. On December 9, 2010, Gurule received a written warning and lost a fourth-quarter bonus for causing yet another mix of diesel fuel and gasoline. Finally on May 19, 2011, Gurule was given an oral warning for yet another mix causing Respondent to pump out the mix and replace it. Gurule still received his bonus.

The record reflects that Respondent gave much more severe discipline to Holguin, whose error resulted in no financial loss to Respondent, than to drivers whose mistakes caused great financial harm to Respondent. This evidence supports a conclusion that Respondent's reasons for issuing Holguin a 5-day suspension is pretext. *Guardian Automotive Trim, Inc.*, 340 NLRB 475 fn. 1 (2003); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) A finding of pretext defeats any attempt by Respondent to show it would have issued a 5-day suspension to Holguin despite his union activities. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Finally, Respondent's virtually nonexistent investigation into the matter also supports a conclusion of improper motive. See *Firestone Textile Co.*, 203 NLRB 89, 95 (1973); *Burger King Corp.*, 279 NLRB 227, 239 (1986). Respondent justified its 5-day suspension of Holguin on the basis that his error was huge and required Respondent to collect money from a customer who had not ordered the fuel. This defense doesn't withstand the light of day. The customer had ordered the fuel delivered by Holguin and they paid for it. This defense was a sham.

I find Respondent's disparate treatment of Holguin and the sham investigation preclude it from asserting it would have suspended him in the absence of his union activity. Respondent's conduct violated Section 8(a)(3) of the Act.

[172] GC Exh. 156.

Complaint paragraph 7(b) alleges that about September 8, 2011 Respondent selectively increased the pay and benefits of some of its employees.

This complaint allegation seems to relate to the allegations contained in complaint paragraph 5(l) in which, it is alleged that Respondent granted employees increased benefits and pay in violation of Section 8(a)(1) of the Act. There is no evidence that any of the pay and benefit increases were implemented in a discriminatory fashion. The grant of increased pay and benefits has already been dealt with under the discussion of complaint paragraphs 5(i)–(l). I will recommend that this allegation be dismissed.

IV. Summary

Given the large number of complaint allegations discussed in this decision, I will summarize which allegations have been sustained and which have been dismissed.

I have found the following complaint paragraphs were sustained and will be remedied below:

Complaint paragraphs 2(d)–(f) and (g); complaint paragraphs 4(b) and (c); complaint paragraphs 5(b), (c), (d), (e), (f)(1), and (2), (h), (i), (j), (k), (l), (m)(1)–(3), (n)(1)–(3), (o)(1), and (3)–(5), (p)(1) and (2), (q)(1) and (3), (s)(1) (3) and (4), (t)(1)–(4), (u)(1)–(3), (v)(1) and (2), (x)(1)–(4), (y), (z)(1)–(3), (aa)(1)–(4), (bb), (cc)(1)–(3), (dd), (ff), (gg), (hh)(1)–(3), (jj)(1) and (3), (kk); complaint paragraphs 6(a)–(j); and complaint paragraphs 7(a) and (c)–(j).

I have found the following complaint paragraphs were not sustained and will recommend they be dismissed:

Complaint paragraphs 5(g), (o)(2), (q)(2), (r)(1) and (2), (s)(2), (w)(1)–(3) and (ee); and complaint paragraph 7(b).

CONCLUSIONS OF LAW

1. Respondents Western Refining, Inc., Western Refining Southwest, Inc., Giant Industries, Inc., and Western Refining Wholesale, Inc, constitute a single integrated business enterprise and an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. Each is therefore jointly and severally responsible for the remedy of the unfair labor practices of the others.

2. Chauffeurs, Teamsters, and Helpers Local Union 492, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) Maintaining the following conflicts of interest rule in its Western Refining, Inc. employee handbook:

> Soliciting contributions or the sale of goods and services by or for other businesses or organizations on Company property is prohibited unless prior consent is received from an officer of the Company.

(b) Maintaining the following confidential information rule in its Western Refining, Inc. employee handbook:

> Directors, officers and employees will obtain confidential information about the Company, its customers, operations, business prospects and opportunities in the course of their employment or tenure with the Company. Confidential information includes the following, although this list is not exclusive:
>
> ***
>
> employee lists and employment data:
>
> ***
>
> other information relating to the Company and its employees, products, services and operations.

(c) Maintaining and disparately enforcing the following solicitation and distribution rule in its Western Refining Inc. employee handbook:

> Employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time. Employees who are not on working time (e.g., those on breaks or lunch time) may not solicit employees who are on working time for any cause or distribute literature of any kind to them. Employees may not distribute literature or printed materials of any kind in working areas at any time.
>
> 3. Any employee who is off-duty should not return to the Company premises until the next scheduled work time, unless he has prior approval from his supervisor.

(d) Maintaining the following work assignments & scheduling rule in its Western Refining employee handbook for retail associates:

> Off-duty employees and non-employees, including family members, are not allowed in work areas and are not allowed to loiter on the store property. Only employees scheduled to be at work should be in the store prior to opening or after closing hours.

(e) Promulgating, maintaining, and enforcing a rule prohibiting employees from discussing the union.

(f) Promulgating, maintaining, and enforcing a rule prohibiting employees from prohibiting off-duty employees from being in the drivers' room.

(g) Promulgating, maintaining, and enforcing a rule prohibiting employees from distributing literature in the drivers' room.

(h) Interrogating employees about their union activities.

(i) Engaging in surveillance of its employees' union activities.

(j) Creating the impression that its employees' union activities were under surveillance.

(k) Promising its employees increased benefits and pay to discourage union activity.

(l) Granting its employees increased benefits and pay to discourage union activity.

(m) Soliciting employee complaints and grievances and impliedly promising employees increased benefits and improved terms and conditions of employment if they rejected the Union as their bargaining representative.

(n) Threatening its employees with reprisals if they engaged in union activities.

(o) Threatening its employees with lower wages if they selected the union as their bargaining representative.

(p) Threatening its employees with discipline if they violated Respondent's overbroad and discriminatorily enforced solicitation and distribution rule because they engaged in union activities.

(q) Threatening its employees with discipline if they violated its rule prohibiting employees from discussing the union.

(r) Threatening its employees with plant closure if they selected the union as their bargaining representative.

(s) Threatening its employees with discharge if they selected the union as their bargaining representative.

(t) Threatening its employees with loss of medical and other benefits if they selected the union as their bargaining representative.

(u) Threatening its employees with lengthy litigation if they selected the union as their bargaining representative.

(v) Threatening its employees with loss of quarterly bonuses if they selected the union as their bargaining representative and for violating Respondent's overly broad solicitation and distribution rule.

(w) Threatening its employees by inviting them to quit because they engaged in union activities.

(x) Inviting its employees to report other employees' union activities to Respondent.

(y) Informing its employees that it would be futile for them to select the union as bargaining representative.

(z) Discriminatorily denying its employees and union organizers access to nonworking areas of its property because they were engaged in union activity.

(aa) Threatening to call the police on its employees and union organizers because they were engaged in union activity.

4. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(3) of the Act.

(a) Accelerating the termination date for employee Leroy Reggensberg because he engaged in union activities.

(b) Issuing warnings to employees Kevin Taddy, Obie Frazier, and Roberto Aguirre because they engaged in union activities.

(c) Suspending employees Reginald Lemoine, Kevin Taddy, and Jaime Holguin because they engaged in union activities.

REMEDY

The record reflects that Respondent has an intranet portal that is available to all employees via their computers and computer kiosks at all of its facilities. The record reflects further that Respondent customarily uses its internet portal to communicate messages and policies to its employees. Accordingly, as directed by the Board in *J. Picini Flooring*, 356 NLRB No. 9, slip op at 3, I will direct that Respondent shall distribute the notice via its internet portal.

In addition to the usual Board remedies, counsel for the General Counsel requests special remedies here in order to restore the status quo before Respondent embarked upon its course of unfair labor practices in multiple worksites including its Gallup, Bloomfield, Albuquerque, and El Paso terminals.

I. Notice Reading and Access to Bulletin Boards

First, the General Counsel requests that the notice to employees herein be read to employees by either a management official in the presence of a Board agent, or Board agent in the presence of a management official. Next, the General Counsel requests an order requiring Respondent to permit union access to its bulletin boards. *Excel Case Ready*, 334 NLRB 4, 5 (2001).

The Board has broad discretion to fashion a just remedy to fit the circumstances of each case it confronts. *Maramont Corp.,* 317 NLRB 1035, 1037 (1995). The Supreme Court has interpreted Section 10(c) as vesting the Board with discretion to devise remedies that effectuate the policies of the Act. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 898–899 (1984). Where there is evidence of widespread and flagrant violations of the Act, the Board has recognized that traditional remedies may be insufficient to dissipate the effects of the employer's unfair labor practices. *U.S. Service Industries*, 319 NLRB 231, 232 (1995).

Here, as soon as Respondent learned that its employees were once again embarking upon union organizing efforts, it commenced a widespread and flagrant campaign designed to derail those efforts. Respondent interrogated its employees at numerous terminals in New Mexico and Texas about their union activities, threatened numerous employees with discipline if they talked about the Union with fellow employees at work, while at the same time it permitted hired labor consultants and antiunion employees to solicit petitions against the Union. Respondent engaged in surveillance and created the impression that its employees' union activities were under surveillance. Respondent made promises of and then granted improved pay and benefits, knowing that this was a sure way to undermine the Union. Respondent solicited its employees to report employees who supported the Union to Respondent. Respondent prohibited its off-duty employees who supported the Union from having access to its facilities to engage in union activity, while it allowed a wide range of other nonunion activities on its property. Respondent's supervisors threatened plant closure if the Union were successful. Through its surrogates, the LRI labor consultants, Respondents disparaged the Union and threatened that if the Union was successful employees would lose benefits and solicited grievances and promised better benefits if the Union was unsuccessful. Finally Respondent issued discipline and suspensions to six key union adherents.

Having found Respondent has engaged in widespread and serious unfair labor practices in the context of a renewed organizing campaign, I find additional remedies are necessary to dissipate the lingering effects of Respondent's illegal conduct.

First, I will require that drivers and warehouse employees be assembled at each of their worksites in New Mexico and El Paso, Texas, and that the notice be read to them by the manager responsible for each building or, at the option of the Respondent, by a Board agent in the presence of the manager. *Homer D. Bronson Co.,* 349 NLRB 512, 515 (2007); *U.S. Service Industries*, 319 NLRB 231, 232 (1995).

Second, on request, the Respondent will grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted. Respondent has taken swift and widespread action each time its employees have attempted to engage in any union activity and its actions have been designed to preclude that activity taking place in any of its facilities. By ordering the Respondent to allow the union representatives access to the Respondent's bulletin boards for a reasonable period of time, it will attempt to provide the Respondent's employees with reassurance that they may engage in efforts to engage in Section 7 activities without fear of reprisal. *Blockbuster Pavilion*, 331 NLRB 1274, 1276 (2000).

II. Reimbursement for Excess Taxes Owed and Reporting Backpay to the Social Security Administration

The General Counsel also requests that discriminatees be reimbursed for any excess taxes owed as a result of a lump-sum backpay award and that Respondent be ordered to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the Social Security Administration what periods to which the backpay should be allocated as requested in the remedy section of the complaint herein.

In *Latino Express, Inc.,* 359 NLRB No. 44 (2012), the Board ordered that retroactively it will routinely require the filing of a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters. The Board also held that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year. The Board concluded that it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award and that such matters shall be resolved in compliance proceedings.

Pursuant to *Latino Express*, I will order that Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters. Since it does not appear that any lump-sum backpay awards cover a period longer than 1 year, there is no requirement regarding adverse tax consequences. In any event that issue is reserved for compliance.

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Although the Respondent discriminatorily accelerated the termination date of its employee Leroy Reggensberg, I shall not recommend that he be made whole or reinstated because he was paid through his voluntary resignation date and voluntarily left Respondent for other sought after employment.

The Respondent will be ordered to make whole Kevin Taddy, Reginald Lemoine, and Jaime Holguin whom, it unlawfully suspended and make them whole for any wages or other rights and benefits they may have suffered as a result of the discrimination against them in accordance with the formula set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[173]

ORDER

The Respondents, Western Refining, Inc., Western Refining Southwest, Inc., Giant Industries, Inc., and Western Refining Wholesale, Inc, their successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following conflicts of interest rule in its Western Refining, Inc. employee handbook:

> Soliciting contributions or the sale of goods and services by or for other businesses or organizations on Company property is prohibited unless prior consent is received from an officer of the Company.

(b) Maintaining the following confidential information rule in its Western Refining, Inc. employee handbook:

> Directors, officers and employees will obtain confidential information about the Company, its customers, operations, business prospects and opportunities in the course of their employment or tenure with the Company. Confidential information includes the following, although this list is not exclusive:
>
> ***
>
> employee lists and employment data:
>
> ***
>
> other information relating to the Company and its employees, products, services and operations.

(c) Maintaining and disparately enforcing the following solicitation and distribution rule in its Western Refining Inc. employee handbook:

> Employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time. Employees who are not on working time (e.g., those on breaks or lunch time) may not solicit employees who are on working time for any cause or

[173] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

distribute literature of any kind to them. Employees may not distribute literature or printed materials of any kind in working areas at any time.

3. Any employee who is off-duty should not return to the Company premises until the next scheduled work time, unless he has prior approval from his supervisor.

(d) Maintaining the following work assignments & scheduling rule in its Western Refining employee handbook for retail associates:

Off-duty employees and nonemployees, including family members, are not allowed in work areas and are not allowed to loiter on the store property. Only employees scheduled to be at work should be in the store prior to opening or after closing hours.

(e) Promulgating, maintaining, and enforcing a rule prohibiting employees from discussing the union.

(f) Promulgating, maintaining, and enforcing a rule prohibiting employees from prohibiting off-duty employees from being in the drivers' room.

(g) Promulgating, maintaining, and enforcing a rule prohibiting employees from distributing literature in the drivers' room.

(h) Interrogating employees about their union activities.

(i) Engaging in surveillance of its employees' union activities.

(j) Creating the impression that its employees' union activities were under surveillance.

(k) Promising its employees increased benefits and pay to discourage union activity.

(l) Granting its employees increased benefits and pay to discourage union activity.

(m) Soliciting employee complaints and grievances and impliedly promising employees increased benefits and improved terms and conditions of employment if they rejected the Union as their bargaining representative.

(n) Threatening its employees with reprisals if they engaged in union activities.

(o) Threatening its employees with lower wages if they selected the union as their bargaining representative.

(p) Threatening its employees with discipline if they violated Respondent's overbroad and discriminatorily enforced solicitation and distribution rule because they engaged in union activities.

(q) Threatening its employees with discipline if they violated its rule prohibiting employees from discussing the union.

(r) Threatening its employees with plant closure if they selected the union as their bargaining representative.

(s) Threatening its employees with discharge if they selected the union as their bargaining representative.

(t) Threatening its employees with loss of medical and other benefits if they selected the union as their bargaining representative.

(u) Threatening its employees with lengthy litigation if they selected the union as their bargaining representative.

(v) Threatening its employees with loss of quarterly bonuses if they selected the union as their bargaining representative and for violating Respondent's overly broad solicitation and distribution rule.

(w) Threatening its employees by inviting them to quit because they engaged in union activities.

(x) Inviting its employees to report other employees' union activities to Respondent.

(y) Informing its employees that it would be futile for them to select the union as bargaining representative.

(z) Discriminatorily denying its employees and union organizers access to nonworking areas of its property because they were engaged in union activity.

(aa) Threatening to call the police on its employees and union organizers because they were engaged in union activity.

(bb) Accelerating the termination, warning or, suspending because they engaged in union activities.

(cc) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the conflicts of interest, confidential information, and the former solicitation and distribution rule in its Western Refining, Inc. employee handbook and the work assignments & scheduling rule in its Western Refining employee handbook for retail associates.

(b) Furnish all current employees with inserts for the current employee handbooks that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (3) provide the language of lawful rules and notify all employees

who were issued the former Western Refining, Inc. employees handbook containing the unlawful solicitation and distribution rule, that that rule has been rescinded and will no longer be enforced.

(c) Within 14 days from the date of this Order remove from its files any reference to the unlawful accelerated termination of Leroy Reggensberg, the unlawful warnings to Kevin Taddy, Roberto Aguirre, and Obie Frazier and the unlawful suspensions of Reginald Lemoine, Kevin Taddy, and Jaime Holguin and within 3 days thereafter notify them in writing that this has been done and that the accelerated termination, warnings, and suspensions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available at reasonable places designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in New Mexico and El Paso, and mail a copy thereof to each employee laid off subsequent to April 26, 2011, copies of the attached notice marked "Appendix."[174] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2011.

(f) Within 60 consecutive days of the date of the Board's Order, convene the Western Refining Wholesale, Inc. drivers and warehouse employees during working times at the Respondents' facilities in New Mexico and El Paso, Texas, by shifts, whereupon Respondents' manager in charge of each facility where drivers and warehouse employees are employed, with a Board agent to be present, be required to publicly read the notice to employees.

(g) Within 60 consecutive days of the date of the Board's Order on request, the Respondent will grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted in its New Mexico and El Paso, Texas facilities for a period of 1 year.

[174] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2013

_____
John J. McCarrick
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT maintain the following conflicts of interest rule in our Western Refining, Inc. employee handbook:

> Soliciting contributions or the sale of goods and services by or for other businesses or organizations on Company property is prohibited unless prior consent is received from an officer of the Company.

WE WILL NOT maintain the following confidential information rule in our Western Refining, Inc. employee handbook:

> Directors, officers and employees will obtain confidential information about the Company, its customers, operations, business prospects and opportunities in the course of their employment or tenure with the Company. Confidential information includes the following, although this list is not exclusive:
>
> ***
>
> employee lists and employment data:
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> ***
>
> other information relating to the Company and its employees, products, services and operations.

WE WILL NOT maintain and disparately enforce the following solicitation and distribution rule in our Western Refining Inc. employee handbook:

> Employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time. Employees who are not on working time (e.g., those on breaks or lunch time) may not solicit employees who are on working time for any cause or distribute literature of any kind to them. Employees may not distribute literature or printed materials of any kind in working areas at any time.
>
> 3. Any employee who is off-duty should not return to the Company premises until the next scheduled work time, unless he has prior approval from his supervisor.

WE WILL NOT maintain the following work assignments & scheduling rule in its Western Refining employee handbook for retail associates:

> Off-duty employees and nonemployees, including family members, are not allowed in work areas and are not allowed to loiter on the store property. Only employees scheduled to be at work should be in the store prior to opening or after closing hours.

WE WILL NOT promulgate, maintain, and enforce a rule prohibiting employees from discussing the union.

WE WILL NOT promulgate, maintain, and enforce a rule prohibiting off-duty employees from being in the drivers' room.

WE WILL NOT promulgate, maintain, and enforce a rule prohibiting employees from distributing literature in the drivers' room.

WE WILL NOT interrogate employees about their union activities.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT promise our employees increased benefits and pay to discourage union activity.

WE WILL NOT grant our employees increased benefits and pay to discourage union activity.

WE WILL NOT solicit employee complaints and grievances and impliedly promise employees increased benefits and improved terms and conditions of employment if they reject the Union as their bargaining representative.

WE WILL NOT threaten our employees with reprisals if they engage in union activities.

WE WILL NOT threaten our employees with lower wages if they select the union as their bargaining representative.

WE WILL NOT threaten our employees with discipline if they violate our overbroad and discriminatorily enforced solicitation and distribution rule because they engage in union activities.

WE WILL NOT threaten our employees with discipline if they violate our rule prohibiting employees from discussing the union.

WE WILL NOT threaten our employees with plant closure if they select the union as their bargaining representative.

WE WILL NOT threaten our employees with discharge if they select the union as their bargaining representative.

WE WILL NOT threaten our employees with loss of medical and other benefits if they select the union as their bargaining representative.

WE WILL NOT threaten our employees with lengthy litigation if they select the union as their bargaining representative.

WE WILL NOT threaten our employees with loss of quarterly bonuses if they select the union as their bargaining representative.

WE WILL NOT threaten our employees with loss of quarterly bonuses for violating Respondent's overly broad solicitation and distribution rule.

WE WILL NOT threaten our employees by inviting them to quit because they engage in union activities.

WE WILL NOT invite our employees to report other employees' union activities to us.

WE WILL NOT inform our employees that it would be futile for them to select the union as bargaining representative.

WE WILL NOT discriminatorily deny our employees and union organizers access to nonworking areas of our property because they are engaged in union activity.

WE WILL NOT threaten to call the police on our employees and union organizers because they are engaged in union activity.

WE WILL NOT accelerate your termination date, issue you warnings, or suspend you because you engage in union activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL make Reginald Lemoine, Kevin Taddy, and Jaime Holguin whole for any loss of wages and benefits, with interest, that they suffered as a result of their suspension or any other unlawful action taken against them.

WE WILL remove from our files any reference to the unlawful accelerated terminations, warnings, and suspensions of Leroy Reggensberg, Reginald Lemoine, Kevin Taddy, Jaime Holguin, Roberto Aguirre, and Obie Frazier; and **WE WILL** not make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against you.

WE WILL rescind the conflicts of interest, confidential information, and the former solicitation and distribution rule in our Western Refining, Inc. employee handbook and the work assignments & scheduling rule in its Western Refining employee handbook for retail associates.

WE WILL furnish all current employees with inserts for the current employee handbooks that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (3) provide the language of lawful rules and notify all employees who were issued the former Western Refining, Inc. employees handbook containing the unlawful solicitation and distribution rule that that rule has been rescinded and will no longer be enforced.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Reginald Lemoine, Kevin Taddy, and Jaime Holguin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL grant the Union and its representatives reasonable access to the our bulletin boards and all places where notices to employees are customarily posted in our New Mexico and El Paso, Texas facilities for a period of 1 year.

WESTERN REFINING, INC., WESTERN REFINING SOUTWEST, INC., GIANT INDUSTRIES, INC., WESTERN REFINING WHOLESALE, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above. The final decision and this notice are available in either English or Spanish.